Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY, d/b/a
THE CHARLOTTE OBSERVER,
and JOHN HECHINGER

Petitioners,

v.

PRESBYTERIAN HEALTH SERVICES CORP.

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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170 pp

QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution create a presumptive right in the public to attend civil court proceedings and have access to civil court records?

2. Is it implicit in the First Amendment right of the public to attend civil court proceedings and to access civil court records that the public has the procedural right to appear at such a civil court proceeding for the limited purpose of being heard on its objections to the closure of such proceedings or the sealing of such records?

3. Does North Carolina's mandatory closure of civil proceedings and records in cases involving hospital peer reviews violate the First Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were:

- **A. Ron Virmani, M. D.** the original plaintiff who is a resident of Charlotte, Mecklenburg County, North Carolina. Dr. Virmani brought the original action against the Respondent Presbyterian Health Services Corp. alleging that the hospital had violated its by-laws in denying him the right to practice at its hospitals. Dr. Virmani is not a party to this petition because he did not oppose the Petitioners' motions that the proceedings and records in this case be open to the public and in fact joined in the Petitioners' position to the Supreme Court of North Carolina that the civil proceedings and records at issue be opened to the public.

- **Presbyterian Health Services Corp.**, a North Carolina corporation which, at the time the original action was brought, operated two hospitals located in the Charlotte, North Carolina area. Subsequent to the institution of the original action, this corporation was purchased by Novant Health, Inc., a North Carolina Corporation whose principal place of business is located in Winston-Salem, North Carolina.

-**The Knight Publishing Company,** a Delaware corporation which owns and operates *The Charlotte Observer,* a newspaper of general daily circulation located in Charlotte, Mecklenburg County, North Carolina and which was one of the original petitioners to the North Carolina General Court of Justice, Superior Court Division for Mecklenburg County, North Carolina requesting that it be allowed to intervene and be heard on the issue of closure and sealing of records in the underlying civil action between Dr. Virmani and Presbyterian Health Services.

- **John Hechinger**, who, at the time of the filing of the original motion with the North Carolina Trial Court, was a resident of Charlotte, Mecklenburg County North Carolina and employed as a reporter for *The Charlotte Observer*. At the present time, Mr. Hechinger is a reporter for *The Wall Street Journal*.

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PETITION FOR WRIT OF CERTIORARI

Knight Publishing Company d/b/a *THE CHARLOTTE OBSERVER* and John Hechinger pray that a Writ of Certiorari issue to review the final judgment of the Supreme Court of North Carolina entered in the above-entitled proceeding on September 17, 1999.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 350 N.C. 449, 515 S.E.2d 675 (N.C. 1999) and is reprinted in the Appendix at App. 1a.

The order of the North Carolina Supreme Court denying the Petitioners' petition for Rehearing pursuant to Rule 31 of the N.C. Rules of Appellate Procedure was entered on the 17th Day of September, 1999, and is reprinted in the Appendix at App.79a.

The Opinion of the North Carolina Court of Appeals is reported at 127 N.C.App. 629, 493 S.E.2d 310 (N.C. App. 1997) and is reprinted in the Appendix at App.43a.

BASIS FOR THE COURT'S JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 from the final judgment and decision of the highest court of last resort in the State of North Carolina, the North Carolina Supreme Court, rendered on September 17, 1999 and is brought to this Court within ninety (90) days of such final decision denying the Petitioners' petition for Rehearing in accord with Supreme Court Rule 13.1.

STATUTES INVOLVED

North Carolina General Statutes § 131E-95 **Medical review committee.** This statute is found at App. 83a.

North Carolina General Statutes § 1A-1 Rule 24. This statute is found at App. 82a.

STATEMENT OF THE CASE

This case involves a factual pattern that occurs every day in both State and Federal courts throughout the United States: either the Plaintiff , Defendant or both parties in a civil court proceeding seek an order from the trial court closing the proceedings to the public and sealing the records of the proceeding. (See App.115a) All too often the trial courts grant such motions as a matter of course and make no findings of fact, conclusions of law or, as the record in this case discloses, do not even allow objecting members of the public to be heard in opposition to such closure. (See App. 84a). While all of the State and Federal lower appellate courts known to the Petitioners which have come to consider the issue have found that there is either a state constitutional right, a right under the First Amendment of the United States Constitution or both that creates a presumption of openness of civil proceedings and records, the various tests articulated by these courts to be used upon consideration of the issue of closure vary from state to state and from federal circuit to circuit. This case affords the Court the opportunity to directly establish (1) the public's presumptive right under the First Amendment to open civil proceedings and records, (2) the public's right to be heard on the issue of closure by the trial tribunal at the time the issue is being decided, and (3) a uniform standard by which the courts below are to weigh the competing factors entering into the

decision of whether any given civil matter should be closed to protect articulated overriding interests of the state or the parties involved.

The underlying case was originally brought by A. Ron Virmani, a medical doctor, against Presbyterian Health Services Corp., the owner and operator of two hospitals in Charlotte, North Carolina.(The Hospital) Dr. Virmani claimed that The Hospital had denied him privileges at The Hospital in violation of its by-laws. Shortly after the suit was instituted, The Hospital sought and obtained several orders sealing the exhibits attached to Dr. Virmani's complaint which had already been filed and were in open court records. (See App. 66a, 69a, 71a, 74a, 76a, 97a & 101a). When The Hospital's motion for summary judgment came on to be heard by the trial court, The Hospital moved for an order closing the hearing and sealing the records it was presenting to the court in support of its motion for summary judgment citing North Carolina General Statute §131E-95 in support of this motion. (See App. 71a & 86a). Mr. John Hechinger, a reporter for *The Charlotte Observer*, was present in the courtroom and immediately objected to the closure and requested a short continuance so that his attorney could be present to represent him in opposition to the motions. Both of Mr. Hechinger's requests were summarily denied without his being afforded an opportunity to be heard. Mr. Hechinger was ejected from the courtroom, and the hearing proceeded behind locked courtroom doors. (*See* App. 86a).

The next day the Petitioners (*The Observer*) filed a written motion with the judge holding the hearing requesting that it be allowed to intervene for the limited purpose of objecting to and being heard concerning the closure of the hearing and sealing of records which had been entered late in the afternoon on the day before. (See App. 103a) The presiding

judge summarily denied *The Observer's* motions without hearing or allowing argument by counsel. (See App. 84a) *The Observer* sought relief from the North Carolina Court of Appeals which granted Certiorari. The Court of Appeals entered a unanimous judgment in *The Observer's* favor finding that the trial court was in error and that the documents introduced, as well as the transcript of the hearing, were to be opened to the public. (See App. 43a).

The Supreme Court of North Carolina granted The Hospital's petition for discretionary review and found that the North Carolina Constitution created a presumption of openness in civil proceedings and records and that this Court would probably find that the First Amendment to the United States Constitution created a similar presumptive right. However, inconsistent with these rulings, the North Carolina Supreme Court held that the public does not have a right to intervene and be heard by the trial court considering the issue of closure and is relegated to appealing trial courts' orders closing court proceedings and sealing documents to the appellate courts or instituting separate actions seeking such relief. Moreover, the North Carolina Supreme Court held that even if the trial court had afforded *The Observer* a hearing on the issue of closure, North Carolina General Statute §131E-95 mandates closure of the proceedings and sealing of the records, without hearing, even in such a case as this where a hospital voluntarily introduces its peer review findings in support of its summary judgment motion. Even more surprising, the North Carolina Supreme Court held that it was permissible for The Hospital to present these peer review records to the trial court for its consideration in secret without even allowing the Plaintiff or his attorney to see them. (See App. 22a).

Throughout this matter Dr. Virmani has never objected

to making any of the records in this proceeding available to the public and the hearings being open to the public. For this reason he is not listed as a Respondent in this Petition. (*See* App. 110a).

REASONS FOR GRANTING THE WRIT

I.

THE FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS SHOULD APPLY TO CIVIL CASES.

A. An Overview.

If the State of North Carolina had brought criminal charges against Dr. A. Ron Virmani arising from some alleged act of medical malfeasance in the performance of his duties at Charlotte's Presbyterian Hospital, the trial court could not have closed those proceedings without granting the public an opportunity to be heard on its objections to such closure. This is the clear teaching of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), in which this Court initially recognized a First Amendment right of access to criminal trials, and of the numerous subsequent decisions of this Court reinforcing and elaborating upon that right. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press Enterprise II*); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993).

If this had been a criminal case, the *substantive* right of

access emanating from *Richmond Newspapers* would have carried with it a concomitant *procedural* right, vested in the public and the press, to a hearing in the trial court to contest any attempt at closure. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604-07; *Press Enterprise II*, 478 U.S. at 8-11.

If this had been a criminal case, this now well-entrenched procedural right would in turn have triggered three vital constituent obligations: (1) a requirement that the trial court conduct the hearing at a timely juncture, *before* proceedings to which the constitutional right of access is asserted are held; (2) a requirement that the trial court weigh, in a case-specific assessment, the factors that this Court has mandated must be considered prior to closure; and (3) a requirement that the trial court make explicit findings on the record on its assessment of the factors that must be considered prior to closure. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604-07, 609 n.25; *Press Enterprise II*, 478 U.S. at 8-11, 13-15.

If this had been a criminal case, it is beyond peradventure that North Carolina's asserted governmental interest in closure of proceedings implicating hospital peer review processes so as to facilitate candor in those peer review processes would have been insufficient as a matter of law to justify the mandatory, *per se* closure rule imposed by North Carolina's statutory scheme as interpreted by its Supreme Court.

This Court has never decided the question of whether a First Amendment right of access parallel to that first recognized in *Richmond Newspapers* exists for civil proceedings. It of course follows that this Court has also never

addressed the question of whether, if such a presumptive substantive right of access to civil trials exists, the right carries with it an accompanying procedural right to a hearing in the trial court to contest closure, and whether that procedural right includes the same constituent obligations of a timely hearing, case-specific assessment of the balance of interests, and formal findings required in the criminal context by *Richmond Newspapers* and its progeny. Lastly, this Court has not addressed the question of whether the asserted interest in facilitating candor in hospital peer review evaluations is sufficiently compelling to justify a mandatory closure rule in civil trials implicating those evaluations.

Finally, this litigation concerns not merely access to civil judicial proceedings, but access to judicial records in those proceedings. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court recognized a presumptive common law right of access to inspect and copy judicial records and documents. This Court has never addressed the question of whether the right of access to judicial records is binding on state courts, either because it is imposed by the First Amendment, or by the force of federal common law.

The time has come for this Court to address and resolve these issues. The questions presented pose First Amendment conflicts of the highest order, and their resolution is of vital interest to the administration of the civil justice system in state and federal courts throughout the nation. The issues posed here merit this Court's attention because they arise constantly and vexingly in civil litigation throughout the United States. Civil litigants, to put it bluntly, often prefer to conduct proceedings behind closed doors. Members of the press and the public often find themselves in an adversarial position to those litigants, seeking to open up to public scrutiny the processes

that those litigants would prefer to keep secret. The time has come for this Court to address the substantive and procedural principles governing the public's right of access to civil proceedings and records.

The First Amendment access principles developed in the context of criminal proceedings should not mutate when the context moves to civil litigation. North Carolina's mandatory closure of civil proceedings implicating hospital peer review processes violates the First Amendment, and this Court should not permit the state's sweeping closure rule to stand.

B. The Right of Access Should Apply to Civil Proceedings.

The First Amendment should be construed to include a right of public access to civil judicial proceedings. At the heart of this Court's historic ruling in *Richmond Newspapers* was the recognition of the vital role that public access to criminal proceedings plays in the democratic life of the community. *See Richmond Newspapers*, 448 U.S. at 570-71 ("The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results."). In the aftermath of *Richmond Newspapers*, this Court, in a series of opinions, created an analytic framework for determining when a right of access should exist, and what substantive and procedural protections should define its contours.

In *Press-Enterprise* this Court came very close to a *per*

se prohibition on closure. "Closed proceedings," the Court observed, "although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise I*, 464 U.S. at 509. Thus the Court declared: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510.

There are powerful and persuasive reasons, well-grounded in both history and function, for applying the right of access to civil cases. As Justice Oliver Wendell Holmes observed, while on the Supreme Judicial Court of Massachusetts, access to civil judicial proceedings is "of vast importance" because of "the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). *See also, Richmond Newspapers*, 448 U.S. at 580, n. 17 (Plurality Opinion) ("historically both civil and criminal trials have been presumptively open"); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n. 15 (1979) ("[T]here is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases. . . . Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. . . .Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.")

In a similar vein, this Court recognized in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976), that "secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competency and impartiality of judges...." With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This Court has also acknowledged the role of the press as a surrogate for the public, because the public has become increasingly reliant upon the media to inform them about trials. *Richmond Newspapers*, 448 U.S. at 573-74.

As this Court stated in *El Vocero de Puerto Rico v. Puerto Rico*, "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that type or kind of hearing throughout the United States.'" 508 U.S. at 150, (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)).

Applying the tests of logic and experience, lower appellate courts throughout the country have recognized a right of access to civil proceedings. The collective judgment evidenced by this formidable array of cases stands as impressive evidence that public access to civil proceedings is a concept at the heart of our judicial tradition that serves the vital social functions of ensuring the accountability of our legal institutions and facilitating an informed citizenry. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d. 219, 227 (6th Cir. 1996); *United States v. Amodeo*, 44 F.3d 141, 145-47 (2d Cir. 1995); *Grove Fresh*

Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); *Moody v. United States*, 908 F.2d 979 (unpublished opinion), 17 Med. L. Rptr. 2096, 2097 (11th Cir. 1990); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir. 1988); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) *cert. denied sub nom., Cable News Network, Inc. v. United States District Court*, 472 U.S. 1017 (1985); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C*, 710 F.2d 1165, 1179 (6th Cir. 1983) *cert. denied* 465 U.S. 1100 (1984); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983); *Doe v. Santa Fe Independent School District*, 933 F. Supp. 647, 650 (S.D. Tex. 1996); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 86 Cal. Rptr. 2d 778, 802 (Cal. 1999); *Kurtzman v. Hankin*, 714 A.2d 450, 452-53 (Pa. Super.1998); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996); *Del Papa v. Steffen*, 915 P.2d 245, 249 (Nev. 1996); *Hammock v. Hoffman-LaRoche, Inc.*, 662 A.2d 546, 556 (N.J. 1995); *Copley Press, Inc. v. Superior Court*, 7 Cal. Rptr. 2d 841, 844 (Cal.App.1992); *Baltimore Sun Co. v. University of Maryland Medical System Corp.*, 584 A.2d 683, 687-88 (Md. App. 1991); *Hutchinson v. Luddy*, 581 A.2d 578, 582 (Pa. Super.1990) *rev'd on other grounds*, 594 A.2d 307 (Pa.1991); *State v. Cottman Transmission Systems, Inc.*, 542 A.2d 859, 863 (Md. App. 1988); *Shenandoah Publ'g House, Inc. v. Fanning*, 368 S.E.2d 253, 256-57 & 257 n.3 (Va.1988); *Plaquemines Parish Community Council v. Delta Dev. Co. Inc.*, 472 So.2d 560, 566-67 (La. 1985); *Charlottesville Newspapers, Inc. v. Berry*, 206 S.E.2d 267, 268 (Va. 1974).

Even in face of this overwhelming authority state court

judges, in many instances, are unwilling to give serious consideration to these First Amendment principles when considering the issue of closure of civil proceedings and the sealing of their records. Protective orders and closed courtrooms are regularly granted as a matter of course just for the asking. In practice, the balancing tests required by this Court for criminal trials which have been favorably recognized by this Court are either entirely disregarded or treated as purely discretionary options in the lower state courts when it comes to a consideration of closure in civil matters.

Petitioner thus respectfully urges this Court to declare that a right of access to civil proceedings exists under the First Amendment, both to lay this substantive issue to rest, and to establish the basis from which the specific procedural and substantive issues posed by this Petition may be addressed.

II.

THE SUBSTANTIVE RIGHT OF ACCESS TO CIVIL JUDICIAL PROCEEDINGS SHOULD BE REINFORCED BY A PROCEDURAL RIGHT TO BE HEARD IN A TIMELY MANNER PARALLEL TO THAT EXISTING IN CRIMINAL PROCEEDINGS.

The North Carolina Supreme Court has held that the public does not have a right to be heard by the trial court on the issue of closure because it does not meet the requirements of North Carolina Rule of Civil Procedure 24, (See App. 10a & 82a) and that the public's rights can be adequately protected "...in a timely manner..." by appealing the trial courts' rulings to the appellate courts by way of extraordinary writs or by instituting separate, independent actions in equity or by declaratory judgment.

Football legend Vince Lombardi once opined: "Winning isn't everything. It's the only thing." In the context of the right of access, much the same might be said of procedure. For however hale the substantive First Amendment right of access may be, it is quickly rendered chimerical without rigorous procedural rules to buttress it. As Justice Powell once aptly observed, "[i]t is not enough, however, that trial courts apply a certain standard to requests for closure. If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion. . . .Upon timely objection to the granting of the motion [for closure], it is incumbent upon the trial court to afford those present a reasonable opportunity to be heard . . ." *Gannett Co. v. DePasquale*, 443 U.S. at 400-01 (Powell, J., concurring).

Justice Powell's observations in the context of access to judicial proceedings resonate with the role that demanding adherence to procedure has historically played in this Court's First Amendment jurisprudence. The normal procedural strictures of our due process traditions have added to them special procedural sensitivities when First Amendment rights are being adjudicated. *See* Henry Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Out of the synergy of the Free Speech Clause and the Due Process Clause a body of doctrine has emerged imposing, in a wide variety of contexts, the observance of carefully crafted procedural requirements before First Amendment interests may be abridged. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977)(requiring expeditious judicial review of administrative ruling denying parade permit); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968)(holding unconstitutional ex parte restraining orders in First Amendment context); *Freedman v. Maryland*, 380 U.S.

51 (1965)(setting forth elaborate procedural safeguards for licensure reviews in obscenity cases). *See also Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978)(holding that courts must "apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search."); *Id.* at 568 (Powell, J., concurring)("a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment").

Unless there is a meaningful opportunity to be heard prior to closure, with a case-specific weighing of the constitutional elements and explicit findings by the trial court facilitating expeditious appellate review, access is a mere paper right, easily defeated in practice. All of these procedural principles have been recognized by this Court in the context of criminal trials. Once it is accepted that the public has a parallel interest in open access to civil proceedings, these procedural protections must apply with undiminished force.

Timeliness is self-evidently critical. The right to appear and be heard in support of one's objections to a closure motion is a necessary and integral component of the presumptive right of access guaranteed under the First Amendment. Unless intervention for the limited purpose of being heard in objection to closure is permitted at the trial court level, the presumptive right of access becomes meaningless and unenforceable. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 86 Cal. Rptr. 2nd 788, 804 (Cal. 1999) ("the same reasons that have led the courts to conclude that delaying public access until the conclusion of a criminal trial is inconsistent with these utilitarian values, compel us not to countenance delaying public access until the conclusion of a civil trial").

The public has the right to be timely heard on the issue of closure of judicial proceedings. The opportunity to be heard prior to closure must be *immediate* and *contemporaneous* if it is to be meaningful and effective. *See, e.g., In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) ("In order to ensure the right of access--of '*immediate and contemporary*' access--our case law has recognized that those who seek access to such material have a right to be heard in a manner that gives full protection of the asserted right. . . . Such full protection requires adequate notice of any limitation of public access to judicial proceedings or documents and an adequate opportunity, under the circumstances of the case, to challenge that limitation by stating to the court the reasons why the material should remain subject to public scrutiny." (emphasis added) (quoting *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994))).

The other important procedural requirements emanating from decisions such as *Press-Enterprise I* are equally vital. Not only must the trial court conduct an immediate hearing, but the First Amendment demands that the trial court channel the exercise of its discretion through a careful inquiry into the legitimacy of the compelling government interest interposed in the *specific* dispute before it and an inquiry into the feasibility of less restrictive means to accomplish that objective. *Press Enterprise I,* 464 U.S. at 510 ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.").

Thus the North Carolina Supreme Court's holding that

intervention by members of the press and public is not available under the North Carolina Rules of Civil Procedure is not just an idiosyncratic and uncharitable interpretation of state law, it is an offense to the First Amendment. The Supreme Court of North Carolina's decision deprives the press and public of the only expeditious opportunity to be heard at a functionally effective juncture in the proceedings, deprives the press and public of the opportunity to demand that the trial court assess the competing interests and apply the required constitutional formula, and deprives the press and public of explicit, meaningful findings on the record by the trial court assessing the alleged justifications for closure and the absence of adequate alternatives.

Moreover, this Court has consistently held that procedural due process and procedural fairness must be guaranteed at every level of the adjudication, including in the court of first instance. *See Ward v. Village of Monroeville, Ohio,* 409 U.S. 57, 62 (1972) (stating that "[n]or, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication"). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'". *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

North Carolina's refusal to recognize the constitutional imperative requiring a "First Amendment-friendly" intervention procedure stands in stark contrast with the experience and logic of a vast number of lower appellate court decisions in which the intervention process has been approved as a vehicle for providing a meaningful opportunity to contest attempts at closure. *See United States v. Amodeo,* 44 F.3d 141, 144 (2d Cir. 1995)(allowing non-party newspaper to intervene

and move to unseal court documents); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.* , 24 F.3d 893, 895-96 (7th Cir. 1994)(holding non-party media has right to intervene and has standing to challenge protective order for abuse or impropriety"); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-78 (3d Cir. 1994)(allowing media to intervene to seek modification of protective orders to obtain access to judicial proceedings or records); *City of Hartford v. Chase*, 733 F.Supp. 533 (D.Conn. 1990)(allowing media to intervene to challenge sealing of documents), *rev'd on other grounds*, 942 F.2d 130, 132-33 (2d Cir. 1991); *Moody v. United States,* 908 F.2d 979 (unpublished opinion), 17 Med. L. Rptr. 2096, 2096-97 (11th Cir. 1990) (allowing media to intervene and to be heard on motion to unseal documents); *Public Citizen v. Liggett Group, Inc.*, 85 F.2d 775, 783 (1st Cir. 1988)(stating that intervention is "the procedurally correct course for third party challenges to protective orders."), *cert. denied*, 488 U.S. 1030 (1989); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)(allowing *Baltimore Sun* to intervene for limited purpose of challenging order sealing medical peer review records and given access to such documents); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 250, 252 (4th Cir. 1988)(allowing *Washington Post* to intervene in appellate proceedings for limited purpose of objecting and seeking access to sealed court records); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 18 (2d Cir. 1984)(granting non-party television station's motion to televise trial after opportunity for hearing), *cert. denied sub nom.*, *Cable News Network, Inc. v. United States District Court*, 472 U.S. 1017 (1985); *In re Knight Publ'g Co.*, 743 F.2d 231, 233-35 (4th Cir. 1984)(holding that members of the press and public must be given notice and opportunity to be heard on issue of closure); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1063-64 (3d Cir. 1984)(allowing non-party newspaper to file motion

and be heard on request for access to court documents); *In the Matter of Continental Illinois Securities*, 732 F.2d 1302, 1306-07 (7th Cir. 1984)(granting non-party newspaper hearing and access to special litigation report); *Newman v. Graddick*, 696 F.2d 796, 799-800 (11th Cir. 1983)(holding the press has standing to seek access in suits to which it is not a party); *Northern States Power Co. v. Westinghouse Elec. Corp.*, 156 F.R.D. 168, 170-71 (D.Minn. 1994) (holding intervention is proper procedure for media challenge to protective order); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 86 Cal.Rptr.2d 778, 782-84 (Cal. 1999)(providing NBC television affiliate notice and opportunity to be heard on Court's own motion to close substantial portions of civil proceedings and to seal records relating thereto); *Kurtzman v. Hankin*, 714 A.2d 450, 452 (Pa. Super. 1998)(holding that newspaper has right to intervene for limited purpose of seeking access to documents and objecting to closure of records and proceedings; "there is no other way for [newspaper] to obtain a remedy but through intervention in this case"); *Ballard v. Herzke*, 924 S.W.2d 652, 657-8 (Tenn. 1996)("third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records."); *Hammock v. Hoffman-LaRoche, Inc.* 662 A.2d 546, 550 (N.J. 1995)(allowing non-party non-media members of public to intervene to challenge sealing of documents); *Davis v. Jennings*, 405 S.E.2d 601, 602-03 (S.C. 1991) (acknowledging that intervention is appropriate for non-party challenge to protective order sealing civil court records); *Baltimore Sun Co. v. University of Maryland Medical System Corp.*, 541 A.2d 683, 684 (Md. App. 1991)(allowing newspaper to intervene to challenge order sealing medical peer review documents); *Hutchinson v. Luddy*, 581 A.2d 578, 581-82 (Pa. Super. 1990)(allowing the newspaper's motion to intervene to assert its First Amendment right of access to

judicial proceedings and pleadings in civil actions) *rev'd on other grounds*, 594 A.2d 307 (Pa.1991); *State v. Cottman Transmission Systems, Inc.*, 542 A.2d 859, 862 (Md.App. 1988)(granting newspaper permission to intervene in proceeding to argue against order sealing pre-trial documents and closing proceedings); *Shenandoah Publishing House, Inc. v. Fanning*, 368 S.E.2d 253, 255 (Va. 1988)(allowing media to intervene to challenge order sealing records where "intervention [by the public] is necessary to give substance to the qualified right of access."(quoting *Richmond Newspapers v. Comm.*, 281 S.E.2d 915, 923 (Va. 1981)(*Richmond Newspapers II*)); *Plaquemines Parish Community Council v. Delta Dev. Co., Inc.*, 472 So.2d 560, 562 (La. 1985)(allowing newspaper to intervene to challenge proposed expansion of protective order sealing documents); *Charlottesville Newspapers, Inc. v. Berry*, 206 S.E.2d 267 (Va. 1974)(granting motion of non-party media to intervene to challenge sealing of pleadings). *See also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224 (6th Cir. 1996)(acknowledging extraordinary writ practice is inadequate to address prior restraints on media).

It is clear that these courts have firmly established a presumptive right of access in the public to open proceedings and records of both civil and criminal trials, which necessarily includes the right to intervene, appear and be heard at the trial court level to assert those rights. The North Carolina Supreme Court's decision that the public and media may not intervene and be heard in a case for this purpose unless they meet state statutory requirements which are repugnant to the United States Constitution and this Court's decisions is unconstitutional and cannot stand.

In addition to the above, if one were to conduct a

correct analysis of Rule 24, the public sould be allowed to intervene as a matter of right. *See, e.g., Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996); *Kurtzman v. Hankin*, 714 A.2d 450 (Pa. Super. 1998).

III

NORTH CAROLINA'S MANDATORY CLOSURE OF CIVIL PROCEEDINGS INVOLVING HOSPITAL PEER REVIEWS VIOLATES THE FIRST AMENDMENT

A. The First Amendment Requires Case-by-Case Weighing of Access Considerations.

Rejecting any case-by-case inquiry into the appropriateness of closure, the Supreme Court of North Carolina construed § 131E-95 of the North Carolina General Statutes as both mandating and justifying closure when hospital peer review findings are implicated. This turned the First Amendment analysis upside down, for it effectively delegated to the North Carolina legislature the power to make a sweeping mandatory closure decision that the Constitution requires be made instead by courts, case-by-case, applying rigorous substantive and procedural norms dictated by First Amendment access principles.

The axiom of today's First Amendment jurisprudence is exactly the opposite of the reasoning of the Supreme Court of North Carolina. The government cannot "define in advance" the words or language of a speaker that defeat First Amendment protection. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978) ("A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands

analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified"); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) (holding that state may not restrict words that have a mere bad tendency to be dangerous, and attempts to penalize "even utterances of a defined character" must satisfy standard applied independently by courts); *Whitney v. California*, 274 U.S. 357, 378-379 (1927) (Brandeis, J., concurring) ("[A legislative declaration] does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."). *See also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 286 (1964))); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (declaring hate speech statute confining proscriptions to use of certain symbols unconstitutional even if the conduct proscribed would otherwise be unprotected under the standards of *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

This Court has made it abundantly clear that decisions

involving claims of access are quintessentially claims requiring case-by-case adjudication. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. at 609 n. 5; *Press-Enterprise II*, 478 U.S. at 9-10, 13-15 (1986); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. at 151 ("The concern of the majority below that publicity will prejudice defendants' fair trial rights is, of course, legitimate. But this concern can and must be addressed on a case-by-case basis."); *Waller v. Georgia*, 467 U.S. at 45 ("the Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care."). North Carolina's across-the-board closure flatly violates these principles, and runs directly contrary to our constitutional tradition that it is the emphatic province and duty of the judicial branch of government "to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803).

B. No Compelling Interest Justifies a Mandatory Shielding of Hospital Peer Review Processes From Public Access During Judicial Proceedings

Viewed with any realism, the North Carolina statute §131E-95 is nothing more than a "sweetheart deal" benefitting one industry that would like to keep its internal peer review processes immune from public scrutiny in messy civil litigation. Any industry might come along and petition a state legislature for a blanket exemption from the normal constitutional presumption that civil proceedings are open to the public, citing similar interests in candor or quality control. The legislature might be persuaded by the facile observation

that the industry's internal review processes are not historically open to the public. This Court, however, should not.

A fundamental substantive flaw in the analysis of the North Carolina Supreme Court was its confusing and combining the state interest in protecting the confidentiality of peer review processes with the constitutional inquiry mandated by *Press Enterprise* into whether logic and experience mandate that civil trials be conducted in the open. The proper question is not whether the hospital peer review process is historically and logically "open to the public," but whether civil courts are. *The Observer* did not seek access to The Hospital's peer review meetings; it sought access to a North Carolina court of law. It is of no moment to the issue at hand as to what peer review committees do in private. It is of no moment that the legislature may choose to forbid the use of peer review records as evidence in medical malpractice actions. What is of importance is what "historical experience and logic" have to say about the openness of civil courts, their exhibits, evidence and records. When the test is properly applied, there is little question but that experience and logic dictate that civil courts and their records have historically been open to the public. Thus, as the facts in this case disclose, if The Hospital determines that it is in its best interest to introduce private, confidential information as evidence on its behalf in a contract action between it and one of its physicians, the constitutional presumption is that these materials lose their confidential nature and become public records open for all to see and examine.

Indeed, any constitutional claim of access to the peer review processes of a private hospital would have been legally incoherent, for of course such proceedings are routinely not "open to the public," and of course legitimate interests in

confidentiality and candor surround them. But once the events that take place in those proceedings become embroiled in civil litigation, once the testimony and documents arising from them become part of the records and evidence in a civil trial, once a judge elected by the voters holds a hearing in a state court and reviews evidence to decide the substantive legal rights of civil litigants, the First Amendment values of open access to courts become transcendent. As Justice Holmes noted "... every citizen should be able to satisfy himself with his own eyes..." that our courts and judges are administering justice fairly. North Carolina has impermissibly attempted to confuse notions of confidentiality and privilege with notions of open trials. In both criminal and civil litigation, litigants routinely seek to uncover events and statements made by parties and witnesses in settings that were private or confidential when made. Laws of evidence and privilege traditionally govern assertions by witnesses that they should not be forced to openly disclose what transpired in such settings. Once, however, such material is disclosed in the judicial proceeding, logic and history require that the public have access to that proceeding, unless the closure is justified by compelling interests of the highest order.

The evidence at issue in this case comes nowhere near importance of any such high order. In this litigation The Hospital has determined that it is in its best interest to voluntarily introduce for consideration by the trial judge, private, confidential information in support of its summary judgment motion in a contract action between it and one of its physicians. There is no right to a fair criminal trial at stake, no assertion by the President of secrets of national security, no sheltering of juveniles from trauma or rape victims from embarrassment, no assertion of *any* concern even approaching interests that might conceivably be of sufficient dimension to make out even a colorable claim for closure. *See Press*

Enterprise II, 478 U.S. at 9, 14 (noting as conceivable "higher values" of "overriding interest" such possibilities as protecting minor victims of sex crimes from the trauma and embarrassment of public scrutiny and the constitutional interest in providing a fair trial). Rather, the First Amendment presumption is that these materials lost their confidential nature when they were voluntarily placed with the trial judge in this litigation by the hospital, becoming public records presumptively open for all to see and examine. *See Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178 (4th Cir. 1998).

Indeed, far from being supported by any compelling governmental interest, the North Carolina statute functions perversely in relation to the normal assumptions of the legal system. Civil courts are not mere private adjudication forums conducted for the convenience of the litigating parties, they are public institutions imbued with a public mission conducting the public's business. To the extent that such interests as encouraging internal institutional candor, the reduction of public embarrassment, the facilitating of the removal of incompetent doctors by easing them out quietly, or the avoidance of future litigation by not drawing attention to questionable practices, are the driving factors behind an effort to conduct civil proceedings in secret, those interests deserve little or no credit in the constitutional calculus. *See, e.g., Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 n. 3 (11th Cir. 1985), ("[t]he defendant's desire to prevent the use of this trial record in other proceedings is simply not an adequate justification for its sealing. . . . Quite the contrary would appear to be true. If formal proceedings occur in one court and are relevant to issues being presented in another court, judicial economy would mandate their availability. . . .The district court must keep in mind the rights of a third

party--the public, 'if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.'" (quoting *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir.1983))). *See also Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir.1983), cert. denied, 465 U.S. 1100 (1984) ("simply showing that the [sealed] information would harm [a] company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir.1984) ("The public's right of access to judicial records has been characterized as 'fundamental to a democratic state. . . .' These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system."); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir.1984) ("The explanation for and the importance of this public right of access to civil trials is that it is inherent in the nature of our democratic form of government.").

As the Sixth Circuit has noted, "[i]n either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson Tobacco Corp. v. F.T.C.*,710 F.2d at 1179 (6th Cir.1983). Whatever case might rarely be made that in a particular set of facts some discrete part of a civil case or some specific document deserves secrecy in order to vindicate a compelling governmental interest, North Carolina's sweeping assumption that all peer review processes deserve such shelter simply cannot stand. To let it stand is to put the courts in unseemly partnership with the special interests of one industry seeking the unique privilege of conducting its litigation disputes privately in public courtrooms.

Openness serves not merely to inform the public regarding the important conflicts of facts, policy, and principle that so often comprise litigation, it serves to vindicate the public interest in the integrity of the judicial process itself. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press- Enterprise I*, 464 U.S.at 508.

In the specific context of litigation involving the administration of medical care, the public interest in open proceedings is enormously strong. As the Supreme Court of Virginia explained in *Shenandoah Publ'g House, Inc. v. Fanning*, "the people have a vital interest, one of personal and familial as well as community concern, in cases involving claims of medical malpractice on the part of licensed practitioners and other health care providers." 368 S.E.2d 253, 256 (1988).

IV

THIS COURT SHOULD RECOGNIZE A FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL RECORDS

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), members of the press sought to make copies of several Watergate tapes, which had been introduced at the trial of certain Watergate defendants. This Court in *Nixon* recognized a common-law right to inspect and copy judicial records and documents. Since *Nixon*, numerous lower courts have

construed the right as being of constitutional dimension. *See, e.g., In re Associated Press*, 162 F.3d 503, 506 (7th Cir. 1998) ("Born of the common law, this right also has constitutional underpinnings."); *Copley Press, Inc. v. Superior Court*, 7 Cal.Rptr.2d 841, 844 (Cal.1992) (holding that the First Amendment provides "broad access rights to judicial hearings and records . . . both in criminal and civil cases.").

Among the most well-developed lines of precedent, for example, comes from the United States Court of Appeals for the Fourth Circuit, which has treated the right as grounded not just in the common law, but in the First Amendment itself, extending it to civil proceedings, and creating significant procedural safeguards against sealing of court documents. *See, e.g., Stone v. University of Maryland System Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir.1988); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir.1986); *In re Knight Publ'g Co.*, 743 F.2d 231 (4th Cir.1984). Under the procedures initially ordained in *Knight Publishing*, a court must first give the public notice of a request to seal and a reasonable opportunity to challenge it. The court must notify persons present in the courtroom of the request, or docket it "reasonably in advance of deciding the issue." 743 F.2d at 235. The court must consider less drastic alternatives to sealing and, if it decides to seal documents, must "state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review." *Id.* The Fourth Circuit also specifically noted that those objecting to closure should be afforded an "...opportunity to submit their views..." to the court before the closure issue is decided. *Id.* at 234. The Fourth Circuit has applied these principles even in litigation implicating national security. *See In re Washington Post Co.*,

807 F.2d at 391-92 ("History teaches us how easily the specter of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse. Accordingly, we hold that the procedural requirements set forth in *Knight Publishing* are fully applicable in the context of closure motions based on threats to national security.").

The decision of the Supreme Court of North Carolina below directly conflicts with these decisions. Litigation involving medical hospital privileges in a federal diversity case in North Carolina would be subject to a First Amendment presumption of access to judicial records, while the same case brought in a North Carolina state court would not. This Court should announce that the right it recognized in *Nixon*, while it may have been born of the common law, does indeed now have constitutional underpinnings, and is as binding on state courts as federal.

CONCLUSION

The questions herein presented are of the greatest importance under the Constitution of the United States and reoccur often in the State and Federal courts of this nation. The North Carolina Supreme Court has clearly reached a decision contrary to all of the courts of this land which have come to consider them as well as a decision contrary to the express and implied holdings of this Court. For the reasons herein stated, the Petitioners pray the Court that it issue its Writ of Certiorari to the North Carolina Supreme Court, review its decision and

reverse the holdings therein in accordance with the Constitution of the United States and the holdings of this Court.

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APPENDIX

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APPENDIX A

IN THE
SUPREME COURT OF NORTH CAROLINA

No. 62PA97-2

A. RON VIRMANI, M.D.

v.

PRESBYTERIAN HEALTH SERVICES CORP.

In Re KNIGHT PUBLISHING COMPANY
D/B/A THE CHARLOTTE OBSERVER
AND JOHN HECHINGER

(Filed 25 June 1999)

DECISION

MITCHELL, Chief Justice.

This appeal presents an issue of first impression for this Court. We are called upon to decide whether the public and the news media have a right of access to civil court proceedings and records pertaining to medical peer review evaluations and, if so, the extent of this right. Specifically, appellant presents questions for review regarding the Court of Appeals' decision reversing several orders entered in a civil lawsuit in Superior Court, Mecklenburg County, which orders closed courtroom proceedings and sealed various documents.

This suit was brought by Dr. Ron Virmani against Presbyterian Health Services Corporation (Presbyterian) following the suspension of Dr. Virmani's medical staff privileges at The Presbyterian Hospital and Presbyterian Hospital Matthews (jointly, the Hospital), hospitals owned and

operated by Presbyterian in Mecklenburg County, North Carolina. For the reasons set forth below, we affirm in part and reverse in part the decision of the Court of Appeals.

The portions of the record open to the public and the facts set forth in the briefs submitted to this Court on which the parties and the putative intervenor agree, indicate that the following events took place in connection with the instant case. After concerns were raised about Dr. Virmani's competence as a physician, Presbyterian conducted a medical peer review evaluation of all of his cases at the Hospital. The medical review committee, comprised of six of Dr. Virmani's colleagues on the medical staff, reviewed the charts of the patients Dr. Virmani had admitted to the Hospital and treated there. Based on the peer review committee's evaluation, Presbyterian concluded that Dr. Virmani's medical judgment posed a serious risk to the health and safety of its patients and, therefore, suspended Dr. Virmani's medical privileges at the Hospital.

After exhausting the administrative appeals available within the Hospital, Dr. Virmani filed this lawsuit against Presbyterian on 22 January 1996, challenging the revocation of his privileges. Dr. Virmani attached numerous documents as exhibits to his complaint. These included copies of: a memo from the chairman (Chairman) of the Hospital's Obstetrics/ Gynecology (OB/GYN) Department requesting a peer review evaluation of Dr. Virmani; a memo from the Chairman summarizing a meeting in which he notified Dr. Virmani of the peer review; a letter from the Chairman and the chairman of the OB/GYN peer review committee to members of the department, informing them of the peer review process; the peer review committee's detailed report and its summary of findings regarding its evaluation of Dr. Virmani; and a letter from Presbyterian's president suspending Dr. Virmani from the

active staff. Dr. Virmani included in his complaint a motion for a temporary restraining order and for a preliminary injunction ordering Presbyterian to comply with the procedures set forth in the Hospital's bylaws and to reinstate Dr. Virmani until it so complied.

On 23 January 1996, Judge Marvin K. Gray conducted a hearing on plaintiff's motion for a temporary restraining order. Presbyterian moved to close the hearing and to seal the exhibits which were attached to the complaint and which contained confidential medical peer review records and materials. On 23 January 1996, Judge Gray signed a temporary restraining order directing the Hospital to readmit Dr. Virmani to the medical staff pending a hearing on his motion for a preliminary injunction. The temporary restraining order also directed that based upon the provisions contained in North Carolina General Statute § 131E-95. Medical Review Committee, the hearing on plaintiff's application for a temporary restraining order shall be confidential; that the exhibits attached to plaintiff's complaint shall be sealed by the clerk of court until further order of this court; and that all other pleadings, affidavits and motions heretofore filed with the court, shall be maintained and available to the public absent a subsequent ruling or order by this court to the contrary.

The exhibits attached to the complaint were sealed and are included in the record on appeal in an envelope marked as "Exhibit 3."

On 7 February 1996, Presbyterian submitted directly to Judge James U. Downs a legal memorandum in opposition to Dr. Virmani's motion for preliminary injunction along with supporting affidavits from various hospital personnel, all of which included medical peer review information. In its cover letter, Presbyterian noted that it had not filed these documents with the court because they were protected under the peer

review statute. Presbyterian further stated in the letter, "We are providing, but not filing these documents in order that the Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute." Thereafter, Judge Downs issued an order on 9 February 1996 sealing confidential peer review information and records in the "Court File." This order sealed Presbyterian's motion to seal confidential peer review records and materials, the affidavits of hospital personnel and exhibits attached thereto, exhibits to plaintiff's complaint, and the memorandum in opposition to Dr. Virmani's motion for preliminary injunction. In the order, Judge Downs found that: (1) Presbyterian had filed with him "sensitive and confidential information and Peer Review Committee records and materials," (2) "under N.C.G.S. § 131E-95 records and materials produced and considered by a Medical Review Committee shall be confidential and not considered public records," and (3) "Medical Review Committee records and materials could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record during the course of the pending litigation."

A hearing was later held on plaintiff Dr. Virmani's motion for a preliminary injunction. On 7 March 1996, Judge Downs entered an order denying injunctive relief and dissolving that part of the earlier temporary restraining order which had ordered Dr. Virmani reinstated.

On 3 April 1996, *The Charlotte Observer* published a story by reporter John Hechinger about Dr. Virmani, based on certain documents Mr. Hechinger had obtained from the court file. On 7 May 1996, Mr. Hechinger attended a calendared hearing in the Superior Court, Mecklenburg County, on Presbyterian's motion to dismiss and the parties' cross motions for summary judgment. Early in the hearing, Presbyterian's attorneys moved to close the courtroom pursuant to N.C.G.S. § 131E-95 because

confidential medical peer review information would be discussed during the hearing. Judge Marcus L. Johnson ordered that the hearing be closed to the public and that confidential peer review records which Presbyterian anticipated presenting to the court be sealed. In making his oral order, Judge Johnson noted that it appeared that during a substantial part of the hearing the parties would be discussing and presenting materials pertaining to peer review information. Mr. Hechinger objected to the closing of the hearing and asked for a continuance to allow him to obtain counsel to argue against the closure. Judge Johnson noted Mr. Hechinger's objection and request for a continuance but proceeded to close the hearing and denied the continuance. Mr. Hechinger complied with the closure by leaving the courtroom.

The following morning, an attorney for Knight Publishing Company d/b/a *The Charlotte Observer* and Mr. Hechinger (jointly, the *Observer*) appeared before Judge Johnson and presented written motions to intervene and to open the proceedings to the public and the news media. Judge Johnson denied the motions without hearing arguments. On 10 May 1996, Judge Johnson entered a written order sealing confidential peer review information and records and closing courtroom proceedings involving the discussion and disclosure of peer review information during a hearing on the parties' summary judgment motions. In this order, Judge Johnson made findings of fact virtually identical to those set forth in Judge Downs' earlier closure order. The parties and the putative intervenor all agree that Judge Johnson's order referred to the *Observer*'s motions and that it effectively, although not expressly, denied them. The order provided that (1) the documents presented or used by the parties in support of their motions which contained confidential peer review information would be sealed by the clerk of court, and (2) the summary judgment motions hearings and courtroom proceedings

involving the medical review committee records, materials and findings would be closed to the public and the media. Subsequent orders were entered sealing videotapes and transcripts of those portions of the previously closed court proceedings in which medical peer review matters were discussed, presented or argued.

The *Observer* filed a notice of appeal and a petition for writ of certiorari with the Court of Appeals. The Court of Appeals allowed the *Observer*'s writ of certiorari as to the orders that (1) sealed confidential information and medical review committee records and materials that were considered by the court and/or were in the court file, (2) closed the court proceedings dealing with confidential medical review committee records and materials, (3) sealed portions of transcripts and videotapes of the court proceedings, and (4) denied the *Observer*'s motions to intervene and to open court proceedings. In its decision issued 18 November 1997, the Court of Appeals reversed all of the Superior Court orders at issue and directed the court to unseal all of the documents and other materials that had been sealed pursuant to those orders. Presbyterian filed timely notice of appeal as of right with this Court pursuant to N.C.G.S. § 7A-30(1), on the theory that the Court of Appeals' decision involved real and substantial questions arising under Article I, Section 18 of the North Carolina Constitution. Presbyterian also petitioned this Court for discretionary review and for a writ of supersedeas of the judgment of the Court of Appeals, which petitions were allowed on 5 March 1998.

We first address defendant-appellant Presbyterian's argument that the Court of Appeals erred in reversing the trial court's order denying the *Observer*'s motion to intervene. On 8 May 1996, the *Observer* moved to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure "for the

limited purpose of objecting to the court's closure of these proceedings to the public and news media." In its motions to intervene and to open the proceedings, the *Observer* asserted that because it was in the business of gathering and reporting to the public newsworthy events in the Charlotte area, it had the constitutional right to petition the court not to close these proceedings and to question the closure of these proceedings because closure of the proceedings to the public would deny them the protections guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the North Carolina Constitution.

The *Observer* argued in its motions that under these circumstances, it was incumbent upon the trial court to conduct a "plenary hearing" and to make findings of fact and conclusions of law in accordance with guidelines provided by the United States Supreme Court.

In an oral order at the hearing on 8 May 1996, Judge Johnson denied the *Observer*'s motions, for "the same reasons as given by Judge Downs in the existing order in the file." On 10 May 1996, Judge Johnson entered a written order closing the hearings and directing the clerk of court to seal the medical review committee records and information that had been submitted to the court, including those which had been attached to the complaint. In this written order, Judge Johnson included several findings similar to those set forth in Judge Downs' prior order, including that: (1) the parties had filed with the judge "sensitive and confidential information and Medical Review Committee records, materials and findings" in support of their motions; (2) the parties would be discussing the contents of these peer review materials during the motion hearings and proceedings; (3) "under N.C.G.S. § 131E-95 records and materials produced by a Medical Review Committee and findings of a Medical Review Committee shall be confidential

and not considered public records" and (4) the peer review materials "could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record or if open to the public or news media during the course of the pending litigation."

The Court of Appeals concluded that the trial court had erred in denying the *Observer*'s motion to intervene without holding a hearing and without making findings of fact and conclusions of law. Based on this reasoning, the Court of Appeals reversed the trial court's order denying the motion to intervene. We disagree with the Court of Appeals. We have found no authority in decisions by this Court or the United States Supreme Court, including the cases cited by the *Observer* and the Court of Appeals, which indicates that a trial court must record specific factual findings and conclusions of law prior to denying a motion to intervene. Intervention in North Carolina is governed by statute. Rule 24 of the North Carolina Rules of Civil Procedure determines when a third party may intervene as of right or permissively. N.C.G.S. § 1A-1, Rule 24 (1990). A third party may intervene as a matter of right under Rule 24(a):

> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.G.S. § 1A-1, Rule 24(a). This Court has stated that where no other statute confers an unconditional right to intervene, the

interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A-1, Rule 24(a)

> "must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment . . . . One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect*, inconsequential, *or* a *contingent* one cannot claim the right to defend."

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (quoting *Mullen v. Town of Louisburg*, 225 N.C. 53, 56, 33 S.E.2d 484, 486 (1945)) (emphasis added) (applying former N.C.G.S. § 1-73), *quoted in River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 128, 388 S.E.2d 538, 554 (1990) (applying Rule 24(a)(2)). The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties. *Alford v. Davis*, 131 N.C. App. 214, ___, 505 S.E.2d 917, 920 (1998); *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978).

In the present case, there is no claim that any statute other than N.C.G.S. § 1A-1, Rule 24(a), confers upon the *Observer* an unconditional right to intervene. Nor does the *Observer* have a direct interest in the outcome of Dr. Virmani's wrongful discharge action against Presbyterian. At most, the *Observer* has an "indirect" or "contingent" interest -- an interest common to all persons -- in seeing matters relating to all civil actions made public. The only parties with a direct interest in this civil action are plaintiff and defendant. Because we conclude that the *Observer* has no direct interest in Dr. Virmani's action against Presbyterian and that the *Observer*'s indirect interest may be

adequately asserted in a timely manner by other means, we hold that the *Observer* was not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A-1, Rule 24(a).

We further conclude that the trial court did not err in denying the *Observer* permissive intervention. Rule 24 "contains specific requirements which control and limit intervention." *State ex rel. Comm'r. of Ins. v. N.C. Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980). A private third party may be *permitted* to intervene under Rule 24(b), but only "(1) When a statute confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common." N.C.G.S. § 1A-1, Rule 24(b) (1990). Subject to these limitations, permissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion. *See Comm'r. of Ins.*, 300 N.C. at 468, 269 S.E.2d at 543; *see also Alford*, 131 N.C. App. at ___, 505 S.E.2d at 921; *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992). A trial court abuses its discretion under this statute "where its ruling 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Alford*, ___ N.C. App. at ___, 505 S.E.2d at 921 (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998)). Our trial courts should bear in mind, however, that Rule 24(b)(2) expressly requires that in exercising discretion as to whether to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." N.C.G.S. § 1A-1, Rule 24(b).

In the instant case, the *Observer*'s interest is only indirect or contingent. Further, there was every reason for the trial court

to believe that permitting the *Observer* to intervene would -- as it has -- unduly delay the adjudication of the rights of the original parties. Accordingly, we conclude that the trial court's order denying the *Observer*'s motion to intervene was not so arbitrary that it could not have been the result of a reasoned decision.

In its brief before this Court and the Court of Appeals, the *Observer* argued -- and the Court of Appeals has agreed -- that the trial court erred in "summarily" denying the *Observer*'s motions to intervene *and* its motion to open the proceedings and make certain records public. By posing the question presented in this manner, however, the *Observer* has mixed two different questions -- (1) whether the *Observer* was entitled to intervene, and (2) whether the court proceedings and records must be made public. The United States Supreme Court has indicated that trial court proceedings in criminal cases may not be summarily closed when the trial court is faced with a First Amendment claim to a right of access, "[a]bsent an overriding interest articulated in findings." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581, 65 L. Ed. 2d 973, 992 (1980) (plurality opinion); *see also El Vocero de Puerto Rico (Caribbean International News Corp.) v. Puerto Rico*, 508 U.S. 147, 124 L. Ed. 2d 60 (1993); *Press- Enterprise Co. v. Superior Court*, 478 U.S. 1, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 78 L. Ed. 2d 629 (1984) (*Press- Enterprise I*). We address at other points in this opinion the issue of whether the trial court's findings were sufficient to support its closure of the proceedings and sealing of the documents in this case. That substantive issue is different, however, from the question of who should be allowed to appear and present the issue in a civil case and how it should be presented.

We do not believe that the decisions of the United States Supreme Court cited by the *Observer* required the trial court to record specific findings of fact and conclusions of law when denying the *Observer*'s *motion to intervene* in this civil case. This issue of whether a putative intervenor should be allowed to intervene is an issue separate and apart from the merits of the substantive issue the putative intervenor seeks to raise if it is allowed to intervene, and we do not find the cited cases to be controlling. The *Observer*'s argument would be more compelling if it could not raise the substantive issue of whether court proceedings and records must be made public by any reasonable manner other than intervention as a party. We note, however, that the trial court's denial of the *Observer*'s motion to intervene did not necessarily preclude the *Observer* from presenting full briefs and argument and obtaining a timely ruling on the questions of its right of access to the proceedings and documents in this case. Even if prevented from intervening directly as a party in this civil case, the *Observer* was free to attempt to raise such questions without intervening as a party by (1) extraordinary writ practice, (2) a declaratory judgment action, or (3) resort to established remedies in equity; in fact, these represent the legal methods by which questions of public access to courts and their records are most frequently and successfully raised. *See, e.g., El Vocero de Puerto Rico*, 508 U.S. 147, 124 L. Ed. 2d 60 (declaratory judgment action); *Press- Enterprise II*, 478 U.S. 1, 92 L. Ed. 2d 1 (mandamus proceeding); *Press-Enterprise I*, 464 U.S. 501, 78 L. Ed. 2d 629 (petition for writ of mandate); *Richmond Newspapers*, 448 U.S. 555, 65 L. Ed. 2d 973 (petitions for writ of mandamus and prohibition). Therefore, the *Observer* had alternative means of obtaining a full and timely review of the issue it sought to raise without being allowed to intervene as a party and unduly delay the adjudication of the rights of the original parties.

For the foregoing reasons, we conclude that the trial court did not err in denying the *Observer*'s motion to intervene. Accordingly, we conclude that the Court of Appeals erred in reversing the order of the trial court denying intervention.

Having determined that the trial court did not err by denying the motion of the *Observer* to intervene in this case, it would be appropriate for us to simply reverse the decision of the Court of Appeals without reaching the other issues raised by the *Observer*. However, those issues were addressed and resolved in the decision of the Court of Appeals, are likely to be raised again in some manner with regard to the facts before us in this case, and those issues have been fully briefed and argued before the Court of Appeals and before this Court. Therefore, in the interest of judicial economy, we elect to exercise the rarely used general supervisory power granted *exclusively to this Court* by Article IV, Section 12(1) of the North Carolina Constitution in order to reach and resolve those issues. *See Lea Co. v. N.C. Bd. of Transp.*, 317 N.C. 254, 263, 345 S.E.2d 355, 360 (1986); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

Defendant Presbyterian contends that the Court of Appeals erred in reversing the orders of the trial court closing courtroom proceedings and sealing documents and other materials in this civil action. The *Observer* first responds that because it has an absolute right of access to the peer review documents and testimony regarding the peer review process under N.C.G.S. § 132-1 and N.C.G.S. § 7A-109, the result reached by the Court of Appeals was correct.

Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records. *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992).

Absent "clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *Id.* at 486, 412 S.E.2d at 19. The term "public records," as used in N.C.G.S. § 132-1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings. N.C.G.S. § 132-1(a) (1995). The public's right of access to court records is provided by N.C.G.S. § 7A-109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings. N.C.G.S. § 7A-109(a) (1995).

Notwithstanding the broad scope of the public records statute and the specific grant of authority in N.C.G.S. § 7A-109(a), our trial courts always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order in ensure that each side has a fair and impartial trial. "The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice." *In re Will of Hester*, 320 N.C. 738, 741, 360 S.E.2d 801, 80[illegible] (1987). Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1; *see State v. Britt*, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974); *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940). This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public

policy, the openness ordinarily required of our government will be more harmful than beneficial.

In this case, the trial court sealed medical peer review documents and closed the proceedings relating to them. N.C.G.S. § 131E-95 shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions. The plain language of this statute excludes information and records pertaining to medical review committee proceedings from the public records law. The statute provides in relevant part:

> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "'Public records' defined," and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee.

N.C.G.S. § 131E-95(b) (1997). The purpose of N.C.G.S. § 131E-95 is to promote candor and frank exchange in peer review proceedings. *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986). The statute attempts to accomplish this goal by preventing discovery or introduction into evidence of a medical review committee's proceedings and the records and materials produced or considered by the committee. *Id.* at 82, 347 S.E.2d at 829.

This Court has previously concluded that N.C.G.S. § 131E-95 "'represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.'"

Cameron v. New Hanover Memorial Hosp., Inc., 58 N.C. App. 414, 436, 293 S.E. 2d 901, 914, *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982) (quoting *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320-21 (1974)), *quoted in Shelton*, 318 N.C. at 82, 347 S.E.2d at 829. The statute serves the compelling public purpose of promoting the public health by encouraging "candor and objectivity in the internal workings of medical review committees." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829; *see also Whisenhunt v. Zammit*, 86 N.C. App. 425, 428, 358 S.E.2d 114, 116 (1987); *Cameron*, 58 N.C. App. at 436, 293 S.E.2d at 914. In *Shelton*, this Court also stressed the broad scope of N.C.G.S. § 131E-95:

> Subsection (b) of § 95 protects documents and related information against discovery or introduction into evidence "in *any* civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee."

Shelton, 318 N.C. at 82, 347 S.E.2d at 829 (quoting N.C.G.S. § 131E-95(b)) (emphasis in original).

Nevertheless, the *Observer* argues that the peer review materials and information at issue are not covered by N.C.G.S. § 131E-95 because the statute applies only to third party malpractice plaintiffs. There is absolutely nothing in the plain language of N.C.G.S. § 131E-95 which supports the *Observer*'s contention. Further, this Court rejected a strikingly similar argument in *Shelton*. *Id.* at 81-83, 347 S.E.2d at 828-29. We reject this argument as feckless.

The *Observer* further argues that even if the peer review materials at issue in this case are protected by N.C.G.S. § 131E-95, they became public records once Presbyterian tendered them to the presiding judge for his consideration in

support of Presbyterian's arguments. The *Observer* argues that any document or record which a judge considers in determining litigants' rights is part of the public records of the courts, regardless of whether it was actually introduced as evidence or filed with the court. We can find no case in which either this Court or the United States Supreme Court has established such a rule. We note that the *Observer* relies on several cases decided by the United States Court of Appeals for the Fourth Circuit and by appellate courts of other jurisdictions. None of those cases are binding authority for this Court when addressing this question, which is solely a question of state law. *See State v. Jarrette*, 284 N.C. 625, 654-55, 202 S.E.2d 721, 740 (1974), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1206 (1976). We reject such reasoning because there simply must be a way for a court to review documents alleged to be inadmissible and not "public records" without making them public by placing them in court records which are open to the public or by otherwise causing them to be thrust into the public domain.

As noted above, North Carolina's public records act grants public access to documents it defines as "public records," absent a specific statutory exemption. N.C.G.S. § 132-1(b). A custodian of such "public records" has no discretion to prevent public inspection and copying of such records. N.C.G.S. § 132-6 (1995). This Court has previously held that even documents which are protected from public disclosure by a statutory exemption from the definition of "public records" contained in N.C.G.S. § 132-1(a) are open to the public if they are placed in the public records in a governmental agency's possession. *News & Observer Publ'g Co. v. Poole*, 330 N.C. at 473-74, 412 S.E.2d at 12-13. In *Poole*, *The News and Observer* sought disclosure of certain investigative records prepared by special agents of the State Bureau of Investigation (SBI). Those SBI agents were

assisting a University of North Carolina commission in its investigation of alleged improprieties relating to North Carolina State University's men's basketball team, which allegations were later found to be without evidentiary basis. The SBI improperly delivered to the commission the records in question and a report summarizing its investigation. *The News and Observer* claimed a right to copies of the documents under N.C.G.S. § 132-6. The commission claimed that the documents were protected by an express statutory exemption from the public records act of records and evidence collected and compiled by the SBI. We held that once the SBI placed the investigative reports in the records of the commission, they became commission records which were subject to the public records statute and must be disclosed to the same extent as other commission materials. *Id.* We explained that:

> To extend the statutory exemption to SBI investigative reports which have been placed in the public domain is like unringing a bell -- a practical impossibility. When such reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the extent that agency's records are protected.

Id. at 474, 412 S.E.2d at 12.

In the instant case, the records to which the *Observer* seeks access fall into one of two categories: (1) those originally filed with the clerk of court as part of the public records of the court, or (2) those tendered only to the presiding judge for consideration on the merits of the parties' various motions. We must resolve the issues concerning each of these categories separately.

Plaintiff, Dr. Virmani, attached some of the records in question as exhibits to his complaint which was filed with the

clerk. These documents were made public the moment that Dr. Virmani filed his complaint. While they might otherwise have been protected by N.C.G.S. § 131E-95, once they were filed in the public records of the court by the plaintiff as part of his complaint they were thrust into the public domain *de facto* and became subject to the public records act. *See id.* The public and the news media have the same right to inspect and obtain copies of those records as they do with any other open court records. N.C.G.S. § 132-1(b). Further, the United States Supreme Court has affirmed the right to publish accurately information contained in such court records which are open to the public. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328 (1975).

The Court of Appeals reversed all of the orders of the trial court in question on this appeal and remanded this case to the trial court, "with direction that the trial court unseal all documents previously sealed pursuant to the orders hereby reversed." *Virmani v. Presbyterian Health Servs. Corp.*, 127 N.C. App. 629, 648, 493 S.E.2d 310, 323 (1997). As we have concluded that the documents filed as exhibits attached to plaintiff's complaint entered the public domain and became "public records" once the complaint was filed with the clerk of court, we agree that members of the public, including the *Observer*, were entitled to inspect and obtain copies of *those documents attached to the complaint*. Accordingly, we affirm in part the holding of the Court of Appeals directing that the sealed documents in this case be unsealed, but we affirm that holding only to the extent that it required the unsealing of the envelope marked "Exhibit 3" in the record on appeal, which contains the documents originally attached to plaintiff's complaint when it was filed with the clerk of court.

The exhibits originally attached to plaintiff's complaint included exhibits which were records and materials produced

by the medical review committee and others which were materials considered by the committee. We note that because N.C.G.S. § 131E-95 expressly prohibits the introduction of such documents "into evidence in any civil action," it was improper for Dr. Virmani to attach them to his complaint as evidence or as a forecast of evidence. We emphasize that those documents continue to be inadmissible as evidence or as a forecast of evidence in this case, which is "a civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the [medical peer review] committee." N.C.G.S. § 131E-95. However, as discussed above, once the peer review records attached to the complaint were filed with the court, they entered the public domain and were available, *de facto* and *de jure*, to the public from that source.

We next consider the documents defendant-appellant Presbyterian submitted directly to the presiding judge in support of its arguments on the various pretrial motions. Presbyterian never filed any peer review materials with the clerk of court. Instead, Presbyterian only tendered such documents directly to the trial judge. Throughout the motions proceedings, Presbyterian took painstaking steps to preserve any confidentiality afforded by law to the peer review records and information it submitted to the trial judge. At the outset of each motion hearing and before the parties made any substantive arguments based on the peer review information, Presbyterian asked the presiding judge to seal documents containing confidential medical peer review information and to close the courtroom proceedings relating to this confidential information. In a cover letter to Judge Downs accompanying Presbyterian's legal memorandum in opposition to plaintiff's motion for preliminary injunction, Presbyterian's counsel stated:

> We are providing, *but not filing*, these documents in order that the Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute. We will need to address issues relating to confidentiality and privilege of the peer review process *prior to the commencement of the hearing*.

(Emphasis added). Because N.C.G.S. § 131E-95 clearly prohibits the introduction of peer review materials into evidence, Presbyterian's technique was the proper practice for tendering purportedly confidential peer review materials protected by the statute to the court for its consideration.

Documents which Presbyterian submitted directly to the trial judge and which are included in the record on appeal as sealed exhibits include several affidavits of Presbyterian and Hospital personnel, a transcript of a hearing before a peer review committee, and a legal brief in support of Presbyterian's motion for summary judgment (hereinafter referred to collectively as "Confidential Materials"). On defendant's motions, the trial court sealed these Confidential Materials. After reviewing the Confidential Materials, we conclude that each of them is or includes records and materials either produced by the medical review committee or considered by the committee; therefore, they are excluded from the definition of "public records" contained in our public records act by N.C.G.S. § 131E-95. *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. The trial court properly applied N.C.G.S. § 131E-95 when it ordered that these documents be sealed, as they are not "public records" and are not subject to discovery or introduction into evidence. *Id.*; N.C.G.S. § 131E-95(b).

We further note, however, that N.C.G.S. § 131E-95(b) also provides that:

> information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

N.C.G.S. § 131E-95(b). We have previously stated:

> These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee.

Shelton, 318 N.C. at 83, 347 S.E.2d at 829.

We recognize that our conclusion that these and similar purportedly confidential documents are shielded from public access by N.C.G.S. § 131E-95 deprives the opposing party of the opportunity to review them in order to formulate a substantive argument about whether they are indeed confidential. However, to hold otherwise would nullify the statute, as the efforts of the party asserting the confidentiality of the records would automatically convert them into public records. As a matter of practicality, there is no other way to handle records which are alleged to be confidential or

privileged than that employed here by Presbyterian and the trial court.

Rule 5(e)(1) of the North Carolina Rules of Civil Procedure provides that the presiding judge may permit parties to file papers directly with him or her. N.C.G.S. § 1A-1, Rule 5(e)(1) (Supp. 1998). Under this rule, the party asserting confidentiality may submit the documents to the trial judge for the limited purpose of determining *in camera* whether they should be shielded from the public. In the present case, that was the thrust of Presbyterian's efforts and the trial court understood it to be such. The trial court's review of any such purportedly confidential materials will always be *in camera*, but its ruling will be subject to review by our appellate courts. Where the trial court decides, as here, that as a matter of law the documents are not public records and will not be made available to the public by the court, the documents should be sealed and included in the record, thereby providing a record for appellate review.

The *Observer* also argues that in addition to any statutory right of access, the public has a qualified common law right to inspect and copy public records and documents, including judicial records and documents. The *Observer* does not state whether it relies on a state or federal common law right, or both. In support of this argument, the *Observer* simply relies on citations to both state authorities and *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570 (1978) (5-4 decision). This reliance is misplaced.

The Supreme Court of the United States is uniquely a creature of the United States Constitution and enjoys a breadth of powers and of public confidence unique in the world. It is not, however, a "common law" court in any strict sense of that phrase. In 1938, the Supreme Court of the United States overruled *Swift v. Tyson*, 41 U.S. 1, 10 L. Ed. 865 (1842),

and stated in very careful language that, "[t]here is no federal *general* common law ." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194 (1938) (emphasis added). All post-*Erie* federal common law is specialized to apply to one peculiarly federal concern or another. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 68 L. Ed. 2d 500, 509 (1981). Post-*Erie* federal common law has its ultimate justification in the Constitution. *Erie*, 304 U.S. at 79-80, 82 L. Ed. at 1195. Therefore, post-*Erie* federal common law rules, unlike those of the *Swift* era, are binding on the states through the supremacy clause. George J. Romanik, *Federal Common Law Alive and Well Fifty Years After Erie: Boyle v. United Technologies Corp. and the Government Contractor's Defense*, 22 Conn. L. Rev. 239, 249 (1989); *see also Local 174, Teamsters of America v. Lucas Flour Co.*, 369 U.S. 95, 102, 7 L. Ed. 2d 593, 598 (1962). Recently, the Supreme Court has emphasized that in the strictest sense, federal common law rules are not simply an interpretation of a federal statute or administrative rule, but the judicial creation of a special federal rule of decision. *Atherton v. FDIC*, 519 U.S. 213, 218, 136 L. Ed. 2d 656, 664 (1997). The Supreme Court has also noted that whether federal power should be exercised in a given area to displace state law is primarily a decision for Congress and not the Court. *Id.* Therefore, the Court will not fashion rules of federal common law unless there is a significant conflict between some federal policy or interest and the use of state law. *Id.* Since *Erie*, the Supreme Court has recognized that the instances in which federal common law can be applied are few and restricted. *Texas Industries*, 451 U.S. at 640-43, 68 L. Ed. 2d at 509-11.

Against this background, it is difficult to imagine how the Supreme Court could recognize a federal common law right of public access to *state courts* broader than the right of access already required by the First or Sixth Amendment,

without engaging in the exercise of general supervisory powers over the state courts. The Supreme Court has always taken the position that it has supervisory power over cases tried in federal courts; but as to cases tried in state courts, it has said that its authority is limited to enforcing the commands of the United States Constitution. *E.g.*, *Mu'Min v. Virginia*, 500 U.S. 415, 422, 114 L. Ed. 2d 493, 503 (1991); *see also Victor v. Nebraska*, 511 U.S. 1, 17, 127 L. Ed. 2d 583, 597 (1994). Although the Supreme Court requires no guidance from this Court, we suggest the possibility that no federal common law right of access to *state courts* should be recognized if the right of access is already protected by the First or Sixth Amendment; conversely, if the right of access is not guaranteed by the Constitution of the United States, the adoption of a federal common law rule requiring *state courts* to allow public access would amount to an exercise of supervisory power over the state courts in an area not of federal concern.

Further, the Supreme Court did not purport in *Nixon* to *apply* the common law of any state or federal common law. Instead, in an opinion for a very divided Court, Justice Powell sought, in a discussion which was *obiter dictum* in that case, to "distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common law right of access." *Nixon*, 435 U.S. at 598-99, 55 L. Ed. 2d at 580. Justice Powell eventually abandoned his effort to define a common law rule, saying, "we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here." *Id.* at 599, 55 L. Ed. 2d at 580. Justice Powell did not speculate as to whether any such rule was a state or federal rule but reviewed state cases almost exclusively.

The "tapes at issue" in *Nixon* were tape recordings made and held by the President of the United States. The right of the public to access those tapes presented a peculiarly federal question with regard to which Congress had enacted substantial legislation. The majority actually decided the case "by giving conclusive weight to the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695," which had not been relied upon by the parties or given consideration by the lower federal courts. *Id.* at 616, 55 L. Ed. 2d at 591 (Stevens, J., dissenting). We do not believe that *Nixon* is controlling authority for the proposition that federal or state common law provides the public a right of access to state courts or their records. In any event, we conclude that being constitutionally derived, any possible federal common law right of public access to state court proceedings and records is no greater than the First Amendment right we assume to exist and apply at a later point in this opinion. *See United States v. Kaczynski*, 154 F.3d 930 (9th Cir. 1998).

We next decide whether the *Observer* has a right under the common law of North Carolina to inspect and copy public records and, if so, whether that right includes the records and documents at issue here. When adopted in 1778, before the existence of the United States of America, current N.C.G.S. § 4-1 reaffirmed principles relating to the common law which had first been statutorily recognized for the Colony of North Carolina in 1715. N.C.G.S. § 4-1 provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not otherwise provided for in whole or in part, not

> abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986). This statute appears to have survived without amendment for the 221 years from its enactment to this date. The common law to be applied in North Carolina "is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefore; and is not abrogated, repealed, or obsolete." *Gwathmey v. State*, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995). The common law that remains in force by virtue of N.C.G.S. § 4-1 "may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment." *Id.*

Further, as the common law originally was, and largely continues to be, a body of law discovered and announced in court decisions, this Court, as the court of last resort in North Carolina, may modify the common law of North Carolina to ensure that it has not become obsolete or repugnant to the freedom and independence of this state and our form of government. *Forsyth Memorial Hosp., Inc. v. Chisholm*, 342 N.C. 616, 621, 467 S.E.2d 88, 91 (1996); *Hall v. Post*, 323 N.C. 259, 264, 372 S.E.2d 711, 714 (1988). Perhaps the best example of this Court exercising its rarely used power to modify the common law was set out by Chief Justice Clark:

> Upon this common law it was held in North Carolina, by *Pearson, C.J.*, in *S. v. Black*, 60 N.C., [262 (1864)], that it was the "husband's duty to make the wife behave herself" and to thrash her, if necessary to that end, and in *S. v. Rhodes*, 61 N.C., 453 (1868), this Court sustained the charge of the

> judge below that a man "had the right to whip his wife with a switch no larger than his thumb," and this was cited and approved in *S. v. [Mabrey]*, 64 N.C., [592 (1870)]. But in *S. v. Oliver*, 70 N.C. [60] (in 1874), this Court overruled the numerous decisions to that effect, *Settle, J.*, saying: "The courts have advanced from that barbarism." Thus passed away the vested right of the husband to thrash his wife "with a whip no larger than his thumb," without any statute to change the law.
>
> As late as 1886, in *S. v. Edens*, 95 N.C., 693, the Court again held upon the same "judge-made" law of former times, that a man could "wantonly and maliciously slander" the good name of his wife with impunity, or "assault and beat her" if he inflicted no permanent injury upon her; but a majority of this Court reversed that holding in 1908 without any statute, in *S. v. Fulton*, 149 N.C., 485, [63 S.E. 145,] since which time no man has had legal authority to slander or assault and beat his wife in North Carolina. And thus passed away another vested right, or rather another wrong.

Price v. Charlotte Elec. Ry. Co., 160 N.C. 450, 455-56, 76 S.E. 502, 504 (1912) (Clark, C.J., concurring in the result). Decisions of this Court not turning on the application of statutes or constitutional principles constitute common law. *Id.* at 455, 76 S.E. at 504; *see also* O.W. Holmes, Jr., The Common Law, 1, 35 (Boston, Little, Brown, and Co., 1881); 1 James Kent, Commentaries on American Law 470 (4th ed. 1840). Bearing in mind the foregoing principles of common law construction, we turn to the question at hand.

At least since 1887, this Court has recognized a common law right of the public to inspect public records. *News &*

Observer Publ'g Co. v. State ex rel. Starling, 312 N.C. 276, 280, 322 S.E.2d 133, 136 (1984). However, to the extent that our General Assembly has dictated by statute that certain documents will not be available to the public, this common law right has been superseded. We have long held that when the General Assembly, as the policy-making agency of our government, legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State. *Id.* at 281, 322 S.E.2d at 137; *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956). As noted above, the General Assembly has enacted a statute which expressly provides that the proceedings of a medical review committee and the records and materials produced and considered by such a committee "shall be confidential and not considered public records ." N.C.G.S. § 131E-95(b). Therefore, N.C.G.S. § 131E-95 supplants any North Carolina common law right of public access to information regarding medical review committee proceedings and related materials. The *Observer* has no right under the common law of North Carolina to the medical peer review information and materials or to the portions of any hearings in this case pertaining to such information and materials.

We must next turn to the constitutional issues presented on appeal. Defendant Presbyterian contends that the Court of Appeals erred in holding that the orders of the trial court closing the hearings in this case and sealing the Confidential Materials violated the North Carolina Constitution. The *Observer* responds that the decision of the Court of Appeals was correct because Article I, Section 18 of the North Carolina Constitution requires that all court proceedings and all records pertaining to court proceedings be open to the public. This open courts provision states that:

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18. The Court of Appeals engaged in an extensive analysis of the history of similar provisions in the constitutions of several states in the "OPEN COURTS PROVISION" section of its opinion below. *Virmani*, 127 N.C. App. at 637-41, 493 S.E.2d at 315-18. Based on its analysis, the Court of Appeals concluded that

> the open courts provision of our state Constitution creates a presumption that civil court proceedings are to be open to the public and that "the occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare." *Id.* at 645, 493 S.E.2d at 320. The Court of Appeals held that the open courts provision of our state constitution provides the public, including [the *Observer*], a constitutional right of access to the civil court proceedings at issue here, including the videotapes, tapes, and transcripts of these proceedings, and to those portions of the court records sealed by the trial court in the orders on appeal.

Id. at 644, 493 S.E.2d at 320. We do not agree.

Our task here is to determine whether a public right of access to court proceedings and records is inherent in the open courts provision of Article I, § 18 of our state's Constitution. This Court is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). In *Jackson*, we

discussed at length this Court's role as final interpreter of our Constitution:

> We have said that even where provisions of the state and federal Constitutions are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Strictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.

> States remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen rights where none exist under the federal Constitution. *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). In construing the North Carolina Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. [*State ex rel. Martin v.*] *Preston*, 325 N.C. [438,] 449-50, 385 S.E.2d [473,] 479 [1989].

Jackson, 348 N.C. at 648, 503 S.E.2d at 103-04.

This Court has previously stated that Article I, Section 18 provides the public access to our courts. *See State v. Burney*, 302 N.C. 529, 537-38, 276 S.E.2d 693, 698 (1981); *In re Nowell*, 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977); *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976); *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957). In *Raper*, we stated:

> [T]he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35 [now Section 18]. The public, and especially the parties are entitled to see and hear what goes on in the courts. That courts are open is one of the sources of their greatest strength.

Raper, 246 N.C. at 195, 97 S.E.2d at 784 (citations omitted). Our reference to the right of the public there was mere *obiter dictum* unnecessary to the decision of the case, however, as the issue presented in *Raper* was whether the trial court could accept evidence at a hearing from which a *party* to the case was excluded. This Court has never expressly held that Article I, Section 18 provides members of the general public

a right to attend *civil* court proceedings or to inspect or copy the records of such proceedings.

We now hold that the open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a *qualified* constitutional right on the part of the public to attend civil court proceedings. However, given the facts presented here, this qualified right of public access did not preclude the trial court from giving effect to the protections of N.C.G.S. § 131E-95 by sealing the materials in question or closing the court proceedings concerning those materials.

The qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. *Cf. In re Belk*, 107 N.C. App. 448, 420 S.E.2d 682 (concluding that neither the United States Constitution nor the North Carolina Constitution creates a constitutional right of the public to attend civil commitment proceedings), *appeal dismissed and disc. rev. denied*, 333 N.C. 168, 424 S.E.2d 905 (1992); *State v. Lemons*, 348 N.C. 335, 349, 501 S.E.2d 309, 318 (1998) (rights in criminal cases); *Burney*, 302 N.C. at 538, 276 S.E.2d at 699 (same). Thus, although the public has a qualified right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. In performing this analysis, the trial court must consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to

allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access.

Turning to the facts of this case, we conclude that the trial court did not err by excluding the public from the court hearings and by sealing related peer review records which concerned confidential information pertaining to Presbyterian's medical peer review investigation of Dr. Virmani. The judges in the trial court properly sealed the Confidential Materials as well as the videotapes and transcripts of the closed hearings; in doing so, they also provided a sufficient record for our appellate review.

We begin with the presumption that the civil court proceedings and records at issue in this case must be open to the public, including the news media, under Article I, Section 18. However, the legislature has determined that this right of access is outweighed by the compelling countervailing governmental interest in protecting the confidentiality of the medical peer review process. The General Assembly has recognized the public's compelling interest in such confidentiality by enacting N.C.G.S. § 131E-95 and making the confidentiality of medical peer review investigations part of our state's public policy. Neither plaintiff nor the *Observer* challenged the constitutionality of the statute on direct appeal to the Court of Appeals. As a result, no issue concerning the constitutionality of the legislature's adoption of this public policy is before this Court. However, we need not and do not rely upon the legislature's public policy judgment in this regard in order to conclude that the trial court did not err.

In each of its oral orders closing motions hearings and sealing records in this case, the trial court independently recognized this compelling state interest, explaining in each instance that it closed the hearing because the arguments and

records presented would involve confidential peer review information. Each of the written orders closing court proceedings and sealing documents and court records included similar independent findings and conclusions to the effect that, *inter alia,* the matters at issue pertained to confidential medical peer review information and that disclosing the medical review records and materials "could cause harm to plaintiff and defendant and the peer review process if left unsealed in the public record during the course of pending litigation." The findings and conclusions by the trial court are specific enough to allow us to determine whether the trial court's orders sealing documents and closing court were properly entered to serve a compelling public interest. After reviewing the sealed Confidential Materials which were presented or considered in connection with the medical peer review hearings in question, we conclude that they all pertained to medical peer review matters and that the trial court properly sealed them. We reach the same conclusion as to the closing of the court hearings and the sealing of the videotapes and transcripts of the closed court hearings.

The public's interest in access to these court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members. Because such open and honest communication in medical peer review proceedings helps to assure high quality public medical care, maintaining and protecting this confidentiality is in the public's best interest. Further, we conclude that the compelling countervailing public interest in such high quality public medical care overcomes the qualified public right to open civil court proceedings and records of those proceedings.

In order to safeguard the confidentiality of medical peer review information, it was appropriate under the circumstances of this case for the trial court to restrict access to the courtroom and to seal documents which were submitted to the presiding judge for consideration in ruling upon the motions seeking closure but which were never filed as part of the public records of the court. Further, there was no reasonable alternative to closure of the hearings and sealing of the documents in this case. The trial court could not allow such information to enter the public domain while the trial court determined whether it should be treated as confidential, then later withdraw it from the public domain and prevent its broader dissemination. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 496, 43 L. Ed. 2d at 350. For the foregoing reasons, we conclude that the public's qualified right of access to civil court proceedings and records guaranteed by Article I, Section 18 of our state Constitution was not violated by the orders of the trial court in this case. Therefore, we reverse that part of the decision of the Court of Appeals which relates to those proceedings and records.

Having concluded that our state Constitution does not mandate public access to the sealed documents and record in this case, we must consider next the question of whether the United States Constitution provides the public, including the *Observer*, the right to attend the civil court proceedings and to view the records in this case. This issue was properly presented in the Court of Appeals. As that court resolved the issue of public access to the court hearings and records on state constitutional grounds, it did not reach this question of federal law. We must address it now.

The United States Supreme Court has never held that there is a constitutional right of public access to civil court proceedings or related court files. However, the Supreme

Court has held that a qualified right of the public to attend *criminal* trials is implicit in the First Amendment. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 73 L. Ed. 2d 248, 255-57 (1982); *Richmond Newspapers*, 448 U.S. at 580-81, 65 L. Ed. 2d at 991-93 (plurality opinion). The Supreme Court has also extended this right of access to include *voir dire* proceedings in which the jury is selected for a criminal trial, *Press-Enterprise I*, 464 U.S. 501, 78 L. Ed. 2d 629, and to preliminary hearings similar to a trial before a magistrate in criminal cases, *El Vocero de Puerto Rico*, 508 U.S. 147, 124 L. Ed. 2d 60; *Press- Enterprise II*, 478 U.S. 1, 92 L. Ed. 2d 1. The Supreme Court has stated that openness in criminal trials "'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" *Press- Enterprise II*, 478 U.S. at 9, 92 L. Ed. 2d at 10 (quoting *Press- Enterprise I*, 464 U.S. at 508, 78 L. Ed. 2d at 637).

In *Press-Enterprise II*, the Supreme Court departed somewhat from its prior analysis of the public's right of access to the criminal courts as a right implicit in the First Amendment. In that case, the Supreme Court applied the twin tests of experience and logic in determining whether the First Amendment right of access attached to a trial-like preliminary hearing in a criminal case. *See Press-Enterprise II*, 478 U.S. at 8-13, 92 L. Ed. 2d at 9-13. The experience test requires evaluation of "whether the place and process have historically been open to the press and general public." *Id.* at 8, 92 L. Ed. 2d at 10. The logic test requires consideration of "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the proceeding in question meets both of these considerations, then a qualified First Amendment right of public access must be applied. *Id.* at 9, 92 L. Ed. 2d at 10.

However, even if a particular court proceeding passes the tests of experience and logic, the public's *qualified* right of access under the First Amendment may be limited by overriding rights or interests. *Id.*; *Globe Newspaper Co.*, 457 U.S. at 606, 73 L. Ed. 2d at 257. The Supreme Court has held that the circumstances in which the public may be barred from a criminal trial are limited, and that "the State's justification in denying access must be a weighty one." *Globe Newspaper Co.*, 457 U.S. at 606, 73 L. Ed. 2d at 257. "Where . . . the State attempts to deny the right of access [to criminal cases] in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07, 73 L. Ed. 2d at 257. The presiding judge must consider reasonable alternatives to closing the proceeding. *Press- Enterprise II*, 478 U.S. at 14, 92 L. Ed. 2d at 14. Criminal court proceedings cannot be closed unless the trial court makes findings "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510, 78 L. Ed. 2d at 638; *see also Press-Enterprise II*, 478 U.S. at 13-14, 92 L. Ed. 2d at 13-14.

Where the State meets its burden of showing a compelling governmental interest, a trial court may "in the interest of the fair administration of justice impose reasonable limitations on access to a trial." *Richmond Newspapers*, 448 U.S. at 581 n.18, 65 L. Ed. 2d at 992 n.18 (plurality opinion). For example, the Supreme Court has made clear that the public's right of access to the criminal courts may be forced to yield to the government's interest in inhibiting disclosure of sensitive information, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); *Globe Newspaper Co.*, 457 U.S. at 606-07, 73 L. Ed. 2d at 257-59; to a criminal defendant's right to a fair trial, *Press-Enterprise II*, 478 U.S. at 13-14, 92 L. Ed.

2d at 13-14; and to the interest of protecting victims of sex crimes from public scrutiny and embarrassment, *id.* at 9 n.2, 92 L. Ed. 2d at 11 n.2.

Although the Supreme Court has never decided the question of whether the public has a First Amendment right to attend civil court proceedings or to view civil court records, the Court has noted that civil trials historically have been presumptively open to the public. *Richmond Newspapers*, 448 U.S. at 580 n.17, 65 L. Ed. 2d at 992 n.17 (plurality opinion); *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15, 61 L. Ed. 2d 608, 625 n.15 (1979). Several lower federal courts have held that certain civil proceedings are presumptively open under the First Amendment. *See, e.g., Stone v. University of Md. Medical Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988) (record in civil case); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984) (hearing on motions for preliminary injunctions); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-16 (7th Cir. 1984) (hearing on motion to terminate shareholder derivative claims). Although these lower courts have emphasized the strength of the First Amendment presumption of access, they have refused to define this right of access as absolute. For example, one court has stated, "Where the First Amendment guarantees access, . . . access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Stone*, 855 F.2d at 180 (applying First Amendment access standard for criminal trials from *Press-Enterprise I*, 464 U.S. at 510, 78 L. Ed. 2d at 638, to a district court order sealing the court record of a wrongful discharge action brought by a medical school professor).

In recognizing the First Amendment right of access in criminal cases, the Supreme Court stressed "the common

understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Globe Newspaper Co.*, 457 U.S. at 604, 73 L. Ed. 2d at 255 (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 16 L. Ed. 2d 484 (1966)). In explaining in *Globe Newspaper* why the First Amendment guarantees a right of access to criminal trials, the Supreme Court emphasized two features of the criminal justice system. It noted that "the criminal trial historically has been open to the press and general public." *Id.* at 605, 73 L. Ed. 2d at 256. It also observed that access to criminal trials

> enhances the quality and safeguards the integrity of the factfinding process . . . [and] fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process--an essential component in our structure of self-government.

Id. at 606, 73 L. Ed. 2d at 256-57 (footnotes omitted). Similar, but not identical, fundamental principles apply to the public's access to civil court proceedings as well.

Applying the experience and logic test set forth for criminal cases in *Press-Enterprise II*, it is questionable whether the First Amendment presumptive public right of access would attach to the matters at issue in this case. For many years now, the workings of medical review committees and the materials that they consider have been closed to the public and have been deemed confidential. In 1981, the General Assembly enacted former N.C.G.S. § 131-170, the statutory predecessor of N.C.G.S. § 131E-95, on the theory that "'external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity.'" *Cameron v. New Hanover Mem'l Hosp.*, 58 N.C. App. at 436, 293

S.E.2d at 914, (quoting *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320-21), *quoted in Shelton*, 318 N.C. at 82, 347 S.E.2d at 828. Thus, it is not at all clear that the portions of the motions hearings and the documents pertaining to Presbyterian's peer review investigation of Dr. Virmani would pass the experience prong of the public access test.

It is also questionable whether these medical peer review matters would pass the logic test. By enacting N.C.G.S. § 131E-95 and its statutory predecessor, the General Assembly has recognized that public access plays a negative role in the functioning of the medical peer review process. The trial court independently reached the same conclusion in this case.

Assuming *arguendo* that the United States Supreme Court would hold that the qualified First Amendment right of public access applies to civil cases, we conclude that the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and that no alternative to closure will adequately protect that interest. Therefore, we conclude that the trial court properly closed the hearings and properly sealed the Confidential Materials, videotapes, and transcripts of the closed hearings. However, for reasons previously stated in this opinion, the trial court erred in ordering that the exhibits attached to the complaint when it was initially filed with the clerk of court be withdrawn from the public record and sealed.

That part of the decision of the Court of Appeals vacating the orders of the trial court which sealed the exhibits attached to the complaint when it was originally filed is affirmed; the decision of the Court of Appeals vacating the orders of the trial court is otherwise reversed. Therefore, the decision of the Court of Appeals is affirmed in part and reversed in part. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Mecklenburg County, for

modification of its prior orders in a manner consistent with this opinion and for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

APPENDIX B

NORTH CAROLINA COURT OF APPEALS

Mecklenburg County
No. 96-CVS-644

A. RON VIRMANI, MD,
Plaintiff

v.

PRESBYTERIAN HEALTH SERVICES CORP.,
Defendant

In Re KNIGHT PUBLISHING COMPANY
D/B/A THE CHARLOTTE OBSERVER
AND JOHN HECHINGER

(Filed: 18 November 1997)

Upon writ of certiorari allowed through petition by Knight Publishing Company d/b/a The Charlotte Observer and John Hechinger from orders entered 24 January 1996 by Judge Marvin K. Gray, 9 February 1996 by Judge James U. Downs, 10 May 1996 by Judge Marcus L. Johnson, and 15 May 1996 and 22 May 1996 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 May 1997.

McGEE, Judge.

This appeal presents the issue of whether the trial court erred in closing courtroom proceedings to the public and in sealing various documents presented to the court in a civil action filed by Dr. Ron Virmani (Dr. Virmani) against Presbyterian Health Services Corp. (Presbyterian) regarding suspension of Dr. Virmani's medical staff privileges at Presbyterian Hospital in Charlotte.

Shortly after Dr. Virmani filed this action, Presbyterian, in various pre-trial motions, moved to seal confidential medical peer review committee records and materials and to close court proceedings in which these records and materials were introduced or discussed. The motions were granted pursuant to N.C. Gen. Stat. § 131E-95 in various court orders. On 3 April 1996, *The Charlotte Observer* published a story by reporter John Hechinger about Dr. Virmani based on documents Hechinger obtained from the court file. The parties dispute whether these documents had been ordered sealed. On 7 May 1996, Hechinger attended a calendared hearing on Dr. Virmani's motion for summary judgment and on Presbyterian's motions to dismiss and for summary judgment. Early in the hearing, Presbyterian's attorneys moved to close the courtroom pursuant to G.S. § 131E-95 because they anticipated discussion of confidential medical peer review committee materials. The trial court ordered portions of the hearing concerning the medical peer review materials closed to the public. Prior to discussion of the peer review materials, the trial court asked Hechinger to identify himself. Hechinger answered, objected to closing of the hearing, and asked for a continuance in order that he could obtain counsel to argue against closure. The court noted his objection and denied the continuance. Hechinger complied with the closure by exiting the courtroom.

The next morning an attorney for Knight Publishing d/b/a The Charlotte Observer and Hechinger (jointly Knight) appeared before the trial court and presented written motions for intervention and to open the proceedings to the public and the news media. The trial court summarily denied the motions without hearing argument and without making findings of fact or conclusions of law. Presbyterian's attorneys were not present; however, Knight's attorney served a copy of the motions on the law partner of an attorney representing Presbyterian who was present for another matter.

In an order entered 10 May 1996, the trial court referenced Knight's motions and effectively, although not explicitly, denied the motions. Subsequent orders were entered sealing videotapes, tapes, and transcripts of those portions of the previously closed court proceedings in which medical peer review committee and physician credentialing matters were discussed, presented or argued. Knight filed a notice of appeal and petitions for various extraordinary writs including a petition for writ of certiorari with this Court.

By order entered 24 July 1996, our Court allowed the writ of certiorari as to the orders that (1) sealed confidential information and medical peer review committee records and materials that were considered by the court and/or were in the court file, (2) closed the court proceedings dealing with confidential medical peer review committee records and materials, (3) sealed portions of transcripts and videotapes of the court proceedings, and (4) denied Knight's motions to intervene and to open court proceedings.

PUBLIC RECORDS

We first address what right Knight has to attend courtroom proceedings and to review the sealed records in this civil action. Knight asserts access rights under N.C. Gen. Stat. §§ 132-1 and 7A-276.1, Article I, § 18 of our North Carolina Constitution, and the First Amendment of the United States Constitution.

Knight contends the peer review documents and testimony regarding the peer review process are public records under G.S. § 132-1. At common law, citizens have a "right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 55 L. Ed. 2d 570, 579 (1978); *see also News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276, 280, 322 S.E.2d 133, 136 (1984). However, this right

is not absolute. *Nixon,* 435 U.S. at 598, 55 L. Ed. 2d at 580; *News and Observer,* 312 N.C. at 280, 322 S.E.2d at 136. The United States Supreme Court has stated:

> Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case"... Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption ... or as sources of business information that might harm a litigant's competitive standing....

Nixon, 435 U.S. at 598, 55 L. Ed. 2d at 580.

Access to public records in this State is governed by Chapter 132, which provides for liberal access. *See* G.S. § 132-1 *et. seq.; News and Observer,* 312 N.C. at 281, 322 S.E.2d at 137. Under Chapter 132 "public records" are those types of documents enumerated in G.S. § 132-1 "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." G.S. § 132-1 (1995). An "[a]gency of North Carolina government or its subdivisions" is defined broadly in the statute as "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." G.S. § 132-1. The breadth of this definition suggests it is inclusive of our state courts. In addition, in *State*

v. West, 31 N.C. App. 431, 448, 229 S.E.2d 826, 835-36 (1976), *aff'd,* 293 N.C. 18, 235 S.E.2d 150 (1977), an action was brought by the State of North Carolina to recover property of the State, being bills of indictment filed in a North Carolina colonial district superior court in 1767 and 1768. Our Court held the bills of indictment were public records. *West,* 331 N.C. App. at 448, 229 S.E.2d at 835-36. "The trial court having found that the bills of indictment were docketed in the Salisbury District Superior Court, it follows without question that they became public records...." *Id.* Thus, the term "public records" appears to include "all documents, papers ... or other documentary material," as defined in G.S. § 132-1, "made or received pursuant to law or ordinance in connection with the transaction of public business" by any North Carolina court.

However, here the trial court orders were based on G.S. § 131E-95. This statute shields hospitals and professional health services providers from third party attempts to acquire medical review committee records and materials in the context of a civil action. Knight acknowledges that G.S. § 131E-95 expressly provides these records and materials are not public records within the meaning of G.S. § 132-1(b). However, Knight asserts that, in spite of this statute, these records and materials became public records once they were introduced by defendant as evidence in the public forum of this civil action. G.S. § 131E-95 does not explicitly address the impact of a hospital's or professional health services provider's decision to present medical review committee materials as evidence in a civil action. In fact, the legislative decision reflected in G.S. § 131E-95 to protect professional health services providers and hospitals from discovery or introduction of this material into evidence is based on the implicit assumption that the material becomes public once it is introduced into a court proceeding.

In a case addressing a similar issue, our Supreme Court held that records exempt from public records status pursuant to

N.C. Gen. Stat. § 114-15 do not continue to be exempt once they become records of another state agency whose records are public under G.S. § 132-1. *News and Observer Publishing Co. v. Poole,* 330 N.C. 465, 474, 412 S.E.2d 7, 12-13 (1992). Of course, here the medical peer review committee materials were not actually made available to the public as occurred in *Poole* because Presbyterian presented materials to the court in conjunction with the orders closing the proceedings and sealing the record. However, even if the peer review materials became public records under Chapter 132 once they were introduced by Presbyterian as evidence in this action, this occurrence did not divest the trial court issuing the orders in this action of its inherent supervisory power over court records and proceedings and it was not absolutely required by Chapter 132 to allow unfettered public access to the medical peer review committee materials.

STATUTORY PROVISION

Knight further asserts N.C. Gen. Stat. § 7A-276.1 prohibited the court from closing the court proceedings and sealing the records. We disagree. This statute provides:

> No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in

> violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order.

G.S. § 7A-276.1 (1995). This statute only prevents sealing of those records "required to be open to public inspection under any valid statute, regulation, or rule of common law." *See* G.S. § 7A-276.1. In addition, this statute only prohibits a court from restricting the publication of reports regarding matter presented "in open court." *See* G.S. § 7A-276.1. Thus, although court records may generally be public records under G.S. § 132.1, based on its inherent power to control court proceedings, a trial court may, in the proper circumstances, shield portions of court proceedings and records from public view subject to statutory and constitutional limitations.

OPEN COURTS PROVISION

However, a trial court's discretion to close court proceedings and to seal records is subject to constitutional limitations. In addition, the court's application and consideration of G.S. § 131E-95 is not dispositive of Knight's rights because the General Assembly's enactment of G.S. § 131E-95 cannot supercede the constitutional rights of access held by the public. Acts of the General Assembly, to be valid and effective, must be enacted in conformity with both our federal and state constitutions. *See In re Advisory Opinion In re House Bill No. 65,* 227 N.C. 708, 713, 43 S.E.2d 73, 76 (1947); *Brumley v. Baxter,* 225 N.C. 691, 696, 36 S.E.2d 281, 284-95 (1945). Here, Knight does not assert that G.S. § 131E-95 is unconstitutional as written; rather it contends the statute must not be applied or construed by the trial courts and by this Court in a manner which violates Knight's constitutional rights.

Knight contends Article I, § 18 of our North Carolina Constitution creates a presumption that all court proceedings,

including the civil trial proceedings at issue here, are open to the public. Where the meaning of a constitutional provision is clearly expressed, it should be adopted; but, if doubtful, intention of those adopting the Constitution must be sought. *Elliott v. Board of Equalization,* 203 N.C. 749, 753, 166 S.E. 918, 921 (1932). "Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation." *Sneed v. Board of Education,* 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980). "The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected." *State v. Emery,* 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944).

> [A] constitution is intended to be a forward-looking document ...; and where its terms will permit, is to be credited with a certain flexibility which will adapt it to the continuous growth and progress of the State. But when the Constitution provides how orderly progress may be fostered and advanced, and the process involves political rights reserved or expressly secured to the people, the courts will be careful not to encroach on that prerogative....

Purser v. Ledbetter, 227 N.C. 1, 5-6, 40 S.E.2d 702, 706 (1946) (citations omitted). The Constitution should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which are designed to safeguard the liberty and security of the citizen in regard to both person and property. *State v. Harris,* 216 N.C. 746, 764-65, 6 S.E.2d 854, 866 (1940).

Article I, § 18 of the North Carolina Constitution provides: "Sec. 18. Courts shall be open. All courts shall be open; every

person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. The open courts provision was added to the Declaration of Rights of our State Constitution in 1868 as Article I, § 35 (now Article I, § 18). *See* John V. Orth, *The North Carolina State Constitution* 54 (1993); N.C. Const. art. I, § 35 (1868); 5 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming The United States of America* 2803 (1909). The surviving records of the 1868 North Carolina Constitutional Convention reveal neither the origin of our open courts provision nor the framers' intent in adding it to the Declaration of Rights. *See Journal of the Constitutional Convention of the State of North Carolina At Its Session 1868* at 169-71, 213-16, 226-32 (Raleigh: Joseph W. Holden, Convention Printer, 1868) (1868 Journal); *see also* Joseph W. Holden, Convention Proceedings, *North Carolina Standard* (providing day-to-day coverage of convention proceedings). The changes made to this provision in the 1971 Constitution were stylistic, not substantive. Robert L. Farb, *The Public's Right to Attend Criminal Proceedings in North Carolina,* Administration of Justice Memoranda, February 1980, at 6 n.15; *cf.* Report of the North Carolina State Constitution Study Commission 30 (Raleigh 1968).

The committee that drafted the 1868 Declaration of Rights was chaired by David Heaton of Ohio, a lawyer who served in the Ohio Senate before he moved to North Carolina in 1863. *See* 1868 Journal at 169, 213; Max Williams, *David Heaton,* 3 Dictionary of North Carolina Biography 91 (William S. Powell ed., 1988). Some scholars have suggested that our open courts provision was copied from the nearly identical provision of the 1851 Ohio Constitution and/or from the 1838 Pennsylvania Constitution. *See* Farb, *supra,* at 6; Dillard S. Gardner, *The*

Proposed Constitution for North Carolina, Popular Government, June 1934, at 4; *see also* Hugh T. Lefler & Albert R. Newsome, *The History of a Southern State: North Carolina* 490 (3rd ed. 1973).

The constitutions of thirty-eight states contain open courts or right to remedy provisions and twenty-two state constitutions require that their state courts be "open." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution,* 27 U. Mem. L. Rev. 333, 434-35 (1997). Many state constitutions contain some type of open courts provision and some type of right to remedy provision. *Cf. id.*

The U.S. Supreme Court, citing the writings of Sir Edward Coke and Blackstone, among others, has observed that English commentators on the common law assumed the common law rule was that the public could attend both civil and criminal trials. *Gannett Co. v. DePasquale,* 443 U.S. 368, 368 n. 15, 61 L. Ed. 2d 608, 625 n.15 (1979). The writings of Sir Edward Coke, 17th century English judge and legal writer, had a profound influence on the American colonists and on the development of state constitutions. *See* Koch, *supra,* at 363; Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions,* 60 U. Cin. L. Rev. 1307, 1310-12 (1992). Coke wrote four volumes of *Institutes* which were among the few summaries of English law available in the American colonies. Koch, *supra,* at 364; Jonathan M. Hoffman, *By the Course of Law: The Origin of the Open Courts Clause of State Constitutions,* 74 Or. L. Rev. 1279, 1296 (1995). In his commentary on the first chapter of the Statute of Marlebridge (also Marlborough) in his *Second Institutes,* Coke expounded on this chapter's provision that "all persons, as well of high as of low estate, shall receive

justice in the king's court." He comments on the meaning of "[i]n curia domini regis" (in the king's court) as follows:

> *In curia domini regis.* These words are of great importance, for all causes ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, whither all persons may resort; and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court, where the parties councell and attorneys attend, ought orders, rules, awards, and judgements to be made and given, and not in chambers or other private places, where a man may lose his cause, or receive great prejudice, or delay in his absence for want of defence. Nay, that judge that ordereth or ruleth a cause in his chamber, though his order or rule be just, yet offendeth he the law, (as here it appeareth) because he doth it not in court ... Neither are causes to be heard upon petitions, or suggestions and references, but *in curia domini regis.*

1 Edwardo Coke, *The Second Part of the Institutes of the Laws of England* 103-104 (London, E. & R. Brooke 1797); *see also Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 565 n.6, 65 L. Ed. 2d 973, 982 n.6 (1980) (plurality opinion) (discussing Coke's interpretation of the Statute of Marlborough and quoting his commentary on "[i]n curia domini regis").

State constitution open courts provisions also have historical roots in Coke's commentary on Chapter 29 of the 1225 Magna Carta in his *Second Institutes. See* Hoffman, *supra,* at 1284, 1295 n. 104. Hoffman asserts that a primary theme of Coke's interpretation of the Magna Carta was the integrity of the courts as protected by the Magna Carta's guarantee of an independent and impartial judiciary. *See* Hoffman, *supra,* at 1288. Coke's influence on the American

colonies is reflected in the writings of William Penn, who drafted the *Fundamental Laws of West New Jersey* in 1676 and drafted the *Frame of Government of Pennsylvania -- 1682, see* Koch, *supra,* at 364-65, in which he combined a shorthand version of the open courts concept with the Magna Carta prohibition of the sale and delay of justice as follows: "[t]hat all courts shall be open, and justice shall neither be sold, denied nor delayed." *Cf. Frame of Government of Pennsylvania -- 1682, Laws Agreed Upon In England,* 5 Thorpe, *supra,* at 3060; 1 Coke, *supra,* at 45. Versions of this provision later became part of the Pennsylvania Constitution. *See* Koch, *supra,* at 367-68, 389-90 n.365. Section 26 of the 1776 Pennsylvania Constitution provided in pertinent part: "...All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay." 5 Thorpe, *supra,* at 3088.

As the West Virginia Supreme Court of Appeals has observed, many state constitutions similarly couple the command "all courts shall be open" with a clause conferring a right to remedy by due course of law and/or a clause guaranteeing administration of justice without sale, denial, or delay. *State ex rel. Herald Mail Co. v. Hamilton,* 267 S.E.2d 544, 548 (W.Va. 1980) (citing provisions from Pennsylvania, Kentucky, Ohio, Tennessee, and Vermont constitutions).

Placing emphasis on the history of the latter two clauses, some courts have concluded that the open courts clause only confers access rights to litigants but not to the public. Koch, *supra,* at 446 (citing *State, Etc. v. Porter Superior Court,* 412 N.E.2d 748, 751 (Ind. 1980); *Katz v. Katz,* 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986), *appeal denied,* 527 A.2d 542 (Pa. 1987)); *see also C. v. C.,* 320 A.2d 717, 728 (Del. 1974). However, many state courts agree that their open courts clauses provide the public with an independent right of access to court proceedings. *See* Koch, *supra,* at 446; *e.g., Phoenix Newspapers, Inc. v. Superior Court,* 418 P.2d 594, 596-97

(Ariz. 1966) (relying on Arizona Constitution free speech clause but also citing Arizona Constitution courts clause); *KFGO Radio, Inc. v. Rothe,* 298 N.W.2d 505, 510-11 (N.D. 1980), *limited by Dickenson Newspapers, Inc. v. Jorgensen,* 338 N.W.2d 72, 75-76 (N.D. 1983); *State ex rel. The Repository v. Unger,* 504 N.E.2d 37, 39-41 (Ohio 1986); *E. W. Scripps Company v. Fulton,* 125 N.E.2d 896, 899-903 (Ohio Ct. App.), *appeal dismissed,* 130 N.E.2d 701 (Ohio 1955), *but see In re T.R.,* 556 N.E.2d 439, 446-48 (Ohio) (holding Ohio Constitution open courts provision provides no greater protection than First Amendment of federal constitution), *cert. denied,* 498 U.S. 958, 112 L. Ed. 2d 396 (1990); *Oregonian Publishing Co. v. O'Leary,* 736 P.2d 173, 174-78 (Or. 1987); *Federated Publications, Inc. v. Kurtz,* 615 P.2d 440, 445 (Wash. 1980); *Cohen v. Everett City Council,* 535 P.2d 801, 802-04 (Wash. 1975); *Herald Mail,* 267 S.E.2d at 544, 548-49, 551-52 (W.Va. 1980); *see also State v. Copp,* 15 N.H. 212, 215 (1844) (stating "the right to have the courts open is the right of the public and not of the individual"). On this point, the West Virginia Supreme Court of Appeals stated:

> The uniform interpretation of the mandate that the courts "shall be open" by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding.

Herald Mail, 267 S.E.2d at 548.

The United States Constitution does not contain an open courts provision. However, the United States Supreme Court has held the First Amendment creates a presumptive right of the public to attend certain criminal proceedings. *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 6-13, 92 L. Ed.

2d 1, 9-13 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10, 78 L. Ed. 2d 629, 635-38 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 73 L. Ed. 2d 248, 255-57 (1982); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81, 65 L. Ed. 2d at 991-93 (plurality opinion). In *Press-Enterprise II*, the U.S. Supreme Court applied the twin tests of experience and logic in determining whether a First Amendment right of access attached to a California criminal preliminary hearing. *See Press-Enterprise II*, 478 U.S. at 8-13, 92 L. Ed. 2d at 9-13. The experience test requires evaluation of "whether the place and process have historically been open to the press and general public." *Id.* at 8, 92 L. Ed. 2d at 10. The logic test requires consideration of "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

Although the United States Supreme Court has not rendered a decision on whether the public has a presumptive right to attend civil proceedings, the Supreme Court has noted that civil trials historically have been presumptively open to the public. *Gannett Co.*, 443 U.S. at 386 n.15, 61 L. Ed. 2d at 625 n.15; *see also Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17, 65 L. Ed. 2d at 992 n.17 (plurality opinion). Several federal circuit courts have held that certain civil proceedings are presumptively open under the First Amendment. *See Stone v. University of Md. Medical System Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988); *Publicker Industries Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3rd Cir. 1984); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-16 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178-81 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100, 80 L. Ed. 2d 127 (1984); *Newman v. Graddick*, 696 F.2d 796, 800-01 (11th Cir. 1983). Although these courts stress the strength of the First Amendment presumption of access, they have refused

to define this right of access as absolute. *See id.* "Where the First Amendment guarantees access ... access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Stone,* 855 F.2d at 180 (applying First Amendment access standard articulated for criminal trials in *Press-Enterprise I,* 464 U.S. at 510, 78 L. Ed. 2d at 638, to a district court order sealing the court record of a civil rights action brought by a medical school professor).

Our appellate courts have not considered whether Article I, § 18 of our North Carolina Constitution gives the public a constitutional right of access to medical peer review committee records and materials considered by a trial court in a civil action or the right to be present in the courtroom during presentation and discussion of this material. This Court has held a statute which closed civil commitment proceedings to the public was not unconstitutional under the First Amendment. *In re Belk,* 107 N.C. App. 448, 453, 420 S.E.2d 682, 685, *appeal dismissed and disc. review denied,* 333 N.C. 168, 424 S.E.2d 905 (1992). In declining to extend to civil commitment proceedings the First Amendment rights of access to criminal proceedings, our Court based its reasoning in part on the distinction that, prior to 1973, the civil commitment process, unlike traditional civil trials, did not require formal judicial hearings. *Id.* at 452, 420 S.E.2d at 684. Thus, the *Belk* Court did not decide in light of the historical tradition of open civil trials, whether the First Amendment creates a presumption of open civil trial proceedings. In *Belk,* this Court also held Article 1, § 18 does not create a constitutional right of the press and public to attend civil commitment proceedings. *See Belk,* 107 N.C. App. at 453, 420 S.E.2d at 685.

Prior decisions by the North Carolina Supreme Court contain statements that Article I, § 18 provides the public open access to our courts. *See State v. Burney,* 302 N.C. 529, 537,

276 S.E.2d 693, 698 (1981); *In re Nowell,* 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977); *In re Edens,* 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976); *Raper v. Berrier,* 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957). In *Raper,* our Supreme Court stated:

> [T]he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35 [now Section 18]. The public, and especially the parties are entitled to see and hear what goes on in the courts .... That courts are open is one of the sources of their greatest strength.

Raper, 246 N.C. at 195, 97 S.E.2d at 784. We note that *Raper* was decided prior to the adoption of the 1971 Constitution which kept intact the 1868 open courts provision (changing some punctuation marks, rephrasing one word and adding "shall be" to the final clause). *Compare* N.C. Const. art. I, § 18 *with* N.C. Const. art. I, § 35 (1868). "Constitutional conventions that readopt provisions in earlier constitutions without change are presumed to have confirmed and acquiesced in the prior judicial interpretations of the provision." Koch, *supra,* at 347 (citing *Warner v. State,* 81 Tenn. 52, 67-68 (1884) and *State v. Schlier,* 50 Tenn. (3. Heisk.) 281, 283 (1871)). Since *Raper* emphasized the public's right to see and hear what goes on in court, we presume the drafters, General Assembly members, and voters who approved the 1971 Constitution confirmed and acquiesced in our Supreme Court's interpretation of our open courts provision in *Raper.*

However, in applying Article I, § 18, our Supreme Court has recognized limitations on the public's right to be present in court. In *Burney,* the Court held Article I, § 18 was not violated when, during the testimony of a seven-year-old child rape victim, a trial court excluded all persons except the defendant and his family and attorney, defense witnesses, the district

attorney, the state's witnesses, officers of the court, the jury, and members of the child's family. *See Burney,* 302 N.C. at 533-38, 276 S.E.2d at 696-98. Similarly, in *Raper,* although holding a petitioner's rights were violated when a judge conferred with petitioner's daughter in private in a custody hearing, the Court observed that a judge could confer privately with a child in this manner with the consent of the parties. *Raper,* 246 N.C. at 195, 97 S.E.2d at 783-84.

Based on this history, the language of the constitutional text, our appellate courts' consideration of this provision, and other state courts' interpretation of similar provisions, we hold that the open courts provision of our state constitution provides the public, including Knight, a constitutional right of access to the civil court proceedings at issue here, including the videotapes, tapes, and transcripts of these proceedings, and to those portions of the court records sealed by the trial court in the orders on appeal.

We must therefore give initial definition to this right of access. Our state constitution open courts provision has three distinct clauses containing separate but related protections. *See* N.C. Const. art. I, § 18; *Cf. E. W. Scripps Co.,* 125 N.E.2d at 905 (Hurd, J. concurring) (discussing separate nature of clauses in identical open courts provision in Ohio Constitution). The open courts provision employs the word "shall" in the pronouncement that "[a]ll courts *shall* be open." N.C. Const. art. I, § 18 (emphasis added). "As used in statutes, contracts, or the like [the word "shall"] is generally imperative or mandatory." Black's Law Dictionary 1375 (6th ed. 1990); *see also State v. Johnson,* 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (applying this definition to statutes). The framers' use of the imperative word "shall" places constitutional limits on a court's discretion in exercising control of its proceedings and creates a strong presumption that court proceedings be open to the litigants and to the public. Of course, as with the federal

guarantee, we hold that this presumption is not absolute as our Supreme Court has made clear in its previous consideration of this provision. There are some circumstances when a court may close proceedings and seal court records. However, the occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare.

In deciding whether to close court proceedings or seal court records, a court must balance the competing interests and policies at stake in light of the particular circumstances of the case but must give substantial weight to the presumption of open access. A court must keep in mind the nature of the protection provided by the open courts provision, including protection of the court's own integrity as an institution. This integrity is always at stake whenever court proceedings and records are closed to the public. Only when justice is administered openly in public view can the public be sure the courts are functioning impartially and independently of other influences.

A court should also keep in mind the relationship the open courts clause has to the interests protected in the other clauses of Article I, § 18, the right to remedy by due course of law and the right to have justice administered without favor, denial, or delay. Read in connection with these clauses, the open courts clause provides significant court access rights to litigants. There may be other public policies and competing interests at stake in a given case. After evaluating the competing policies and interests, a court should then determine whether any of these are so compelling that they overwhelmingly outweigh the strong presumption that court proceedings and records should be open to the public. Furthermore, if a court determines that closure of proceedings or sealing of records is needed, the closure or sealing order should be exceedingly narrow in scope so as to remove only those materials from public purview as is

necessary to preserve the protected competing policies or interests.

It is our task to apply these principles to the present case. We acknowledge the public policy interest in the confidentiality of medical peer review committee records and materials even when presented in the context of a civil action. However, this interest is counterbalanced by the public's interest in being fully informed regarding Dr. Virmani's challenges to defendant's assessment of his competency and suspension of his medical staff privileges. These interests are in tension with each other. However, when the strong presumption of open access to traditionally open court proceedings is added to the scales, the balance tips substantially towards retention of the open character of these proceedings.

In addition, we observe that the peer review materials were introduced *by defendant* for the trial court's consideration regarding pre-trial motions in this action. In this context, public access to these court materials does not significantly impede defendant's rights of access to court. Defendant was not compelled to present the peer review materials for the trial court's review. It did so of its own volition. By injecting these peer review materials in the public forum of the superior court, defendant subjected the materials to public scrutiny. A party cannot obtain public vindication of its interests in the public forum of our courts without acceding to the public character of this process. We hold the trial court orders closing the court proceedings and sealing the court records in this action constitute reversible error.

Knight also contends the trial court orders violated its rights under the First Amendment of the United States Constitution. Since we have decided that Article I, § 18 of the North Carolina Constitution gives Knight a constitutional right of access at least equivalent to and possibly greater than any

rights of access provided by the First Amendment, we need not address this argument.

RIGHT TO A HEARING

Given the primary importance of the open courts presumption, we also address Knight's contention that the trial court violated its rights under our state constitution by *summarily* denying Knight's motions to intervene and to open the proceedings by rulings made in open court on 8 May 1996 and entered 10 May 1996. We hold the trial court was in error in denying Knight's motions without holding a hearing and without making findings of fact and conclusions of law.

In *Press-Enterprise II,* the U.S. Supreme Court held that, once a First Amendment right attaches, proceedings "cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II,* 478 U.S. at 13-14, 92 L. Ed. 2d at 13. In *Stone v. University of Md. Medical System Corp.,* the United States Court of Appeals for the Fourth Circuit addressed a fact situation similar to the case on appeal, albeit under First Amendment analysis. In *Stone,* a federal district court issued a one sentence order sealing nearly the entire record in a civil rights action without a hearing and without stating reasons for the order. *Stone,* 855 F.2d at 180. *The Baltimore Sun* filed a limited purpose motion to intervene with the Court of Appeals when the plaintiff appealed a summary judgment order. The Court of Appeals granted the motion to intervene and held the district court erred by summarily sealing the record without giving the *Sun* a reasonable opportunity to object to entry of the order and without stating reasons for the order supported by specific findings. *Id.* at 180-81.

Although *Stone* was a civil action, the Court relied on a previous decision, *In re Knight Publishing Co.,* 743 F.2d 231

(4th Cir. 1984), in which the Court held that a court in a criminal proceeding must give the public notice of a request to close a courtroom and to seal records and a reasonable opportunity to challenge the closure and sealing. *Knight,* 743 F.2d at 234-35. In *Knight,* the Court held notice must be given either by docketing the request reasonably in advance of disposition or by notifying persons present in the courtroom of the request and giving them opportunity to object and submit their views prior to closure. *Id.*

Since we have held the protection afforded by the North Carolina Constitution is at least as great as that afforded by the First Amendment, we hold Knight was entitled to the opportunity to be heard and to entry of an order containing adequate supportive findings like those stressed in the *Press-Enterprise* cases, *Stone,* and *Knight.* Thus, we hold the trial court was required, under Article I, § 18 of the North Carolina Constitution: (1) to furnish Knight a meaningful opportunity to be heard on its motion; and (2) to state reasons for its ruling supported by specific findings. Here, since Hechinger was present in the courtroom on 7 May 1996 when the trial court summarily closed the courtroom, he and Knight were entitled to a meaningful opportunity to challenge the closure. This opportunity was effectively denied by the trial court's summary disposition.

RIGHT TO INTERVENE

Presbyterian contends, however, that Knight's motion to intervene was properly denied because Knight did not comply with the procedural requirements for intervention of right under N.C.R. Civ. P. 24(a) or permissive intervention under N.C.R. Civ. P. 24(b). Without deciding whether Knight is entitled to intervention of right under N.C.R. Civ. P. 24(a), we hold permissive intervention under N.C.R. Civ. P. 24(b) is one method available to Knight for the limited purpose of

challenging the orders closing the proceedings and sealing the records in this action.

With only minor exceptions, N.C.R. Civ. P. 24 and Rule 24 of the Federal Rules of Civil Procedure are substantially the same. *Ellis v. Ellis,* 38 N.C. App. 81, 84, 247 S.E.2d 274, 277 (1978). Given this similarity, the holdings of the federal circuit courts are instructive. Several federal circuit courts have held that Federal Rule 24(b) permissive intervention may be used by non-parties for the limited purpose of challenging protective or confidentiality orders entered in an action. *E.g., Pansy v. Borough of Stroudsburg v. Ottaway Newspapers,* 23 F.3d 772, 778 (3rd Cir. 1994); *Beckman Industries Inc. v. International Ins. Co.,* 966 F.2d 470, 473-75 (9th Cir.), *cert. denied,* 506 U.S. 868, 121 L. Ed. 2d 140 (1992); *United Nuclear Corp. v. Cranford Ins. Co.,* 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied,* 498 U.S. 1073, 112 L. Ed. 2d 860 (1991); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods,* 823 F.2d 159, 161-64 (6th Cir. 1987); *Martindell v. International Tel. & Tel. Corp.,* 594 F.2d 291, 294 (2nd Cir. 1979). Other federal circuit courts have held similarly without specifying whether such intervention is permissive or intervention of right. *E.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 896 (7th Cir. 1994); *Public Citizen v. Liggett Group, Inc.,* 858 F.2d 775, 783-87 (1st Cir. 1998), *cert. denied,* 488 U.S. 1030, 102 L. Ed. 2d 970 (1989); *In re Beef Industry Antitrust Litigation,* 589 F.2d 786, 788-89 (5th Cir. 1979).

Presbyterian contends Knight may not intervene under N.C.R. Civ. P. 24(b) because it has not asserted a claim or defense having a question of law or fact in common with the main action. We disagree. In addressing a similar assertion, the Third Circuit Court of Appeals held: "By virtue of the fact that the Newspapers challenge the validity of the Order of Confidentiality entered in the main action, they meet the requirement of Fed.R.Civ.P. 24(b) (2) that their claim must

have 'a question of law or fact in common' with the main action." *Pansy,* 23 F.3d at 778. Here, Knight challenges the validity of orders closing court and sealing the medical peer review materials in the main action in response to Presbyterian's motions. For a limited purpose intervention such as this one, this nexus between Knight's contentions and the motions to close court and to seal records in the main action satisfies the N.C.R. Civ. P. 24(b) requirement of a common question of law or fact.

All of the orders before us on appeal are hereby reversed. This matter is remanded with direction that the trial court unseal all documents previously sealed pursuant to the orders hereby reversed. As part of further proceedings in the trial court regarding unsealing of these materials, the trial court may in its discretion order that names and identifying characteristics of non-witness patients be redacted and that confidentiality of communications between physicians and non-witness patients be protected as permitted by law, including consideration of N.C. Gen. Stat. § 131E-97 and N.C. Gen. Stat. § 8-53.

Reversed and remanded.

Judges EAGLES and SMITH concur.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA

/s/ Gayle W. Bennington
DEPUTY CLERK
11-18. 1997

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,

Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,

Defendant.

FILED May 22 1996

ORDER

THIS CAUSE COMING ON TO BE HEARD, AND BEING HEARD on May 16, 1996 before the Honorable James U. Downs, Superior Court Judge presiding at the May 13, 1996 Session of the Superior Court of Mecklenburg County, upon consent of the parties to clarify the Court's prior Order dated May 15, 1996 as it pertains to the release of video tapes and transcripts of prior courtroom proceedings, and the Court having heard from attorneys for Knight Publishing Company, attorneys for Defendant Presbyterian Health Services Corp., the Mecklenburg County Clerk of Superior Court, and having been informed by attorneys for Knight Publishing Company that the attorneys for Plaintiff did not object to the entering of this Order; and

The parties having consented that this Order may be signed out of term, out of session and out of County if necessary;

IT IS, THEREFORE, ORDERED that the Court's prior Order dated May 15, 1996, as it pertains to the release of transcripts and videotapes, is clarified as follows:

1. The May 15, 1996 Order, ordering the Clerk of Court not to release videotapes and transcripts of Court proceedings to the public or new media, does not apply to the May 8, 1996 courtroom proceeding whereby Knight Publishing Company, d/b/a *The Charlotte Observer,* and John Hechinger filed a Motion for Intervention and Motion to Open the Proceedings to the Public and News Media; and

2. The May 15, 1996 Order applies to all Medical Review Committee and physician credentialling matters heard by the Court or discussed, presented or argued by the parties during the January 24, 1996, February 9, 1996, and May 7, 1996 courtroom proceedings, including videotapes and transcripts of the Temporary Restraining Order hearing, the Preliminary Injunction hearing and the Summary Judgment hearing. The May 15, 1996 Order does not apply to that portion of the videotapes and transcripts of the prior courtroom proceedings (January 24, 1996, February 9, 1996, and May 7, 1996) in which the Court heard, ruled upon and allowed Motions to seal confidential Medical Review Committee records and information, to close court proceedings and/or to hear such matters in private. The May 15, 1996 Order does not apply to that portion of the videotapes and transcripts of any other preliminary matters that may have been heard by the Court prior to closing or sealing the proceedings and prior to hearing evidence of Medical Review Committee and physician credentialling matters pertaining to the Plaintiff, Dr. Virmani.

IT IS FURTHER ORDERED that attorneys for the Plaintiff and Defendant will review the transcript and videotapes along with counsel for Knight Publishing Company in order to determine which portions of the videotapes and transcript should be released and which portions should remain under seal, as provided for in this Order and the previous Orders entered by this Court.

IT IS FURTHER ORDERED that, upon consent of the parties, all documents currently under seal or containing Peer Review Committee information, credentialling information or patient records shall be returned to counsel for the Plaintiff and Defendant who submitted the documents. The attorneys for the Plaintiff and Defendant shall prepare an itemized list of the documents under seal and file the list with the Clerk of Court. Upon the Clerk having received the list, the Clerk shall release and return the Plaintiff's sealed documents to the Plaintiff's attorneys, and the Defendant's sealed documents to the Defendant's attorneys. Plaintiff's and Defendant's attorneys shall thereafter hold said sealed documents intact and shall not change or modify them in any way until further Order of this Court.

This the 22nd day of May, 1996.

/s/ James U. Downs
James U. Downs
Superior Court Judge Presiding

APPENDIX D

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,

Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,

Defendant.

FILED May 15 1996

ORDER

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD before the undersigned Superior Court Judge upon Motion by the Defendant to prevent Mecklenburg County Clerk's office from releasing or disclosing to the public or the news media videotapes of certain courtroom proceedings involving the discussion, review and disclosure of Medical Peer Review Committee records, materials and findings; the Court having reviewed the Court's previous Order entered on May 10, 1996, and having reviewed N.C.G.S. §131E-95; and

IT APPEARING TO THE COURT that the Court's previous Order To Seal Confidential Medical Review Committee Records And Information In Court File And To Close Motion Hearings And Proceedings dated May 10, 1996

applies to all videotapes and transcripts of the courtroom proceedings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Court's May 10, 1996 Order To Seal Confidential Medical Review Committee Records And Information In Court File And To Close Motion Hearings And Proceedings, a copy of which is attached hereto and incorporated by reference, does and shall apply to all of the videotapes, transcripts and tapes made of the courtroom proceedings including but not limited to January 24, 1996, February 9, 1996 and May 7, 1996: and

2. The Clerk of Court and its officers, agents and employees are hereby ordered not to release to the public or news media any videotapes, transcripts, tapes, notes or any other materials, records, documents under seal pertaining to this case or any courtroom proceedings conducted herein.

This the 15th day of May, 1996.

/s/ James U. Downs
Mecklenburg County Superior Court Judge

APPENDIX E

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,

Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,

Defendant.

FILED May 10 1996

ORDER TO SEAL CONFIDENTIAL MEDICAL REVIEW COMMITTEE RECORDS AND INFORMATION IN COURT FILE AND TO CLOSE MOTIONS HEARINGS AND PROCEEDINGS

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD before the Honorable Marcus L. Johnson, Superior Court Judge, upon Motion To Seal Confidential Information and Peer Review Committee records and materials in the Court File and to close the Courtroom during proceedings discussing, involving and pertaining to Medical Peer Review Committee records and findings; the Court having reviewed the pleadings and Affidavits filed herein, having reviewed N.C.G.S. § 131E-95, and having the benefit of oral argument by counsel; and

IT APPEARING TO THE COURT that Defendant and Plaintiff filed with the Judge sensitive and confidential information and Medical Review Committee records, materials and findings in support of Motions, including pending Motions for Summary Judgment calendared for hearing on May 7, 1996; and

IT FURTHER APPEARING TO THE COURT that both Defendant and Plaintiff will be discussing the contents of such Medical Review Committee records and findings by the Medical Review Committee during the Motion hearings and proceedings; and

IT FURTHER APPEARING TO THE COURT that Knight Publishing Company, d/b/a *The Charlotte Observer,* and John Hechinger, a reporter for *The Charlotte Observer,* filed a Motion for Intervention and Motion to Open the Proceedings to the Public and News Media on May 8, 1996; and

IT FURTHER APPEARING TO THE COURT that under N.C.G.S. § 131E-95 records and materials produced by a Medical Review Committee and findings of a Medical Review Committee shall be confidential and not considered public records; and

IT FURTHER APPEARING TO THE COURT that the Medical Review Committee records, materials and findings could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record or if open to the public or news media during the course of the pending litigation;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Defendant's Motion to Seal Confidential Information and Peer Review Committee records and materials, including, but not limited to, the Affidavits of Paul F. Betzold and Ronald L. Brown, M.D., plus all Exhibits attached thereto, Exhibits to the Complaint, the Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, and the Briefs, Notebooks and Handouts in Support of and in Opposition to Motions for Summary Judgment contained in the Court File is granted and all such documents are to be sealed by the Clerk of Court.

2. The Summary Judgment Motions Hearings originally calendared for May 7, 1996, and Courtroom proceedings involving the discussion, review and disclosure of Medical Peer Review Committee records, materials and findings, shall be closed to the public and news media.

This the 10th day of May, 1996.

/s/ Marcus L. Johnson

The Honorable Marcus L. Johnson
Mecklenberg County Superior Court Judge

APPENDIX F

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,
Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,
Defendant.

FILED February 9 1996

ORDER TO SEAL CONFIDENTIAL MEDICAL REVIEW COMMITTEE RECORDS AND INFORMATION IN COURT FILE

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD before the Honorable James U. Downs, Superior Court Judge, upon Defendant's Motion To Seal Confidential Information and Peer Review Committee records and materials in the Court Files the Court having reviewed the pleadings and Affidavits filed herein, having reviewed N.C.G.S. § 131E-95, and having the benefit of oral argument by counsel; and

IT FURTHER APPEARING TO THE COURT that Defendant filed with the Judge on February 7, 1996 sensitive and confidential information and Peer Review Committee records and materials in opposition to Plaintiff's Motion for a

Preliminary Injunction, which Motion was heard on February 9, 1996; and

IT FURTHER APPEARING TO THE COURT that under N.C.G.S. § 131E-95 records and materials produced and considered by a Medical Review Committee shall be confidential and not considered public records; and

IT FURTHER APPEARING TO THE COURT that the Medical Review Committee records and materials could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record during the course of the pending litigation;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Seal Confidential Information and Peer Review Committee records and materials, the Affidavits of Paul F. Betzold and Ronald L. Brown, M.D., plus all exhibits attached thereto, Exhibits to the Complaint and the Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, in the Court File is granted and all such documents are to be sealed, pending further order of this Court.

This the 9th day of February, 1996.

/s/ James Downs

The Honorable James R. Downs, Superior Court Judge

APPENDIX G

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,
Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,
Defendant.

FILED January 24 1996

TEMPORARY RETRAINING ORDER

THIS MATTER, was heard by the undersigned judge presiding over a non-jury civil term of superior court for Mecklenburg County upon the application and motion of plaintiff for a temporary restraining order pursuant to Rule 65 of the North Carolina Rules of Civil Procedure. At the time of the hearing, defendant moved for a confidentiality order with regard to this proceeding and a motion to seal the complaint and exhibits;

It appears to the court from reviewing the verified complaint, the exhibits attached thereto, the case law submitted by the parties and the argument of counsel that the plaintiff may suffer immediate and irreparable harm, absent the relief granted herein, on the grounds that the plaintiff, in order to be qualified for staff privileges, must have a valid medical license within the State of North Carolina and must maintain

professional liability insurance coverage; that both his license and insurance coverage, while still in effect, are under scrutiny and question; that if relief is delayed, the plaintiff may lose his license or insurance coverage either of which events would bar him from readmission to the active medical Staff at the Presbyterian Hospitals; and that, in that event, monetary damages may not adequately or fully compensate the plaintiff for such harm leaving the plaintiff with no adequate remedy at law;

It further appearing to the court that based upon a review of the defendant's Medical Staff Bylaws that plaintiff has made a prima facie showing that a breach of the bylaws could have occurred during the peer review process conducted by the defendant and the subsequent suspension of the plaintiff from the active medical Staff at the Presbyterian Hospitals.

And it appearing to the court that based upon the provisions contained in North Carolina General Statute §131E-95. Medical Review Committee, the hearing on plaintiff's application for a temporary restraining order shall be confidential; that the exhibits attached to plaintiff's complaint shall be sealed by the clerk of court until further order of this court; and that all other pleadings, affidavits and motions heretofore filed with the court, shall be maintained and available to the public absent a subsequent ruling or order by this court to the contrary;

It is hereby ADJUDGED, ORDERED and DECREED that the defendant, Presbyterian Health Services Corp., its respective officers, directors, successors, assigns, agents, employees, affiliates and hospitals and all those acting in concert or participation with any or each of them who receive actual notice of this order in any manner, directly or indirectly, whether by personal service or otherwise, are hereby ordered to readmit the plaintiff, A. Ron Virmani, MD to the active

medical Staff of the Presbyterian Hospitals on condition that, pending the resolution of this action, or until further order of this court, plaintiff shall not perform any invasive or intrusive procedure, operation, or delivery at any hospital operated or owned by the defendant. Other than this limitation, plaintiff shall be entitled to all other rights and privileges of active staff membership and must abide by the Medical Staff Bylaws, the Rules and Regulations of the Medical Staff and any other policy or procedure uniformly enforced by the defendant with respect to physicians admitted to active Staff.

This order shall remain in effect until a preliminary injunction hearing which, by agreement of the parties, has been set before this court on Friday, February 9, 1996. If this court is unavailable on that date, the court may set this matter for hearing on February 8, 1996.

The plaintiff shall cause a bond to be issued for the duration of this order in the amount of $5,000.00.

IT IS SO ORDERED.

DATE: Jan. 23, 1996
TIME: 8:10 P.M.

/s/ Marvin K. Gray
MARVIN K. GRAY,
Superior Court Judge Presiding

APPROVED AS TO FORM:

_____

APPENDIX H

SUPREME COURT OF NORTH CAROLINA

No. 62PA97-2

A. RON VIRMANI, M.D., Plaintiff

v.

PRESBYTERIAN HEALTH SERVICES CORP., Defendant

In Re KNIGHT PUBLISHING COMPANY
D/B/A THE CHARLOTTE OBSERVER
AND JOHN HECHINGER

From NC Court of Appeals
(COA96-1051)
From Mecklenburg
(96CVS644)

****

ORDER

Upon consideration of the Petition filed by Defendant for Rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 17th day of September 1999.

s/ Freeman, J.

For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of September 1999.

/s/ Christie S. Cameron

Christine Speir Cameron
Clerk, Supreme Court of North Carolina

APPENDIX I

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX J

RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be

accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure.

North Carolina General Statute § 131E-95

(a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "' Public records' defined," and shall not be subject to discovery or introduction into evidence in any civil actions against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings. (1973, c. 1111; 1981, c. 725; 1983, c. 775, s. 1.)

APPENDIX K

VIRMANI V. PRESBYTERIAN HEALTH SERVICES, CORP.

TRANSCRIPT OF MOTION HEARING - May 8, 1996

THE HONORABLE MARCUS JOHNSON: Virmani v. Presbyterian Health Services matter. The motion of KPC and for reasons stated in the previous order which hasn't been reduced to writing yet but basically the same reasons as given by Judge Downs in the existing order in the file, the motion is denied.

I should acknowledge attorney Hasty - you need to at least get your appearance on the record here, but I don't need arguments on it. The posture of the case right now is it was due to be continued this morning for a hearing on the mutual motions for summary judgment - the parties think they may have it settled, so they called and asked that we hold off on further proceedings in hopes of getting it settled and might resume if it - it will resume . . . .

JOHN HASTY (counsel for Knight Publishing Company): Yes sir, I would for the record note that I thought Mr. Sitton and Mr. Ahlum would be here this morning. I prepared a certificate of service showing that I hand delivered it but I will go back and fax it to them this morning and I'd like to make the court aware of that.

THE COURT: All right.

JOHN HASTY: And we will, if you, do you intend to reduce your order to writing? Or just ----

THE COURT: Yeah. I'm gonna have Health Services submit an order and basically the same findings as the KPC I put it under [inaudible] but it hasn't been reduced to writing, but it seems to [inaudible] the nature of your concerns in

matters of record disclosed at least part of - so the order will need to be in writing in the file so I'll reduce that to writing.

JOHN HASTY: All right, sir, that will be fine. Thank you.

AL WINDLE: Your Honor, I'm in the same law firm as the attorneys that were in the Virmani hearing yesterday and we had a breakfast meeting this morning and there was some discussion in it and what I understood -- Ms. Keith is in the same firm -- that hearing was continued pending some settlement negotiations this morning. You just said that something was denied. Are the attorneys aware of that? Do I need to inform them --

THE COURT: It was denied on the record. That was the motion, that was the motion to intervene by Knight Publishing for purposes of opening the hearing --

AL WINDLE: . . . Johnston, Taylor, Allison and Hord.

JOHN HASTY: Here you go (handing Mr. Windle a copy of Knight Publishing Company's Motion to Intervene and Motion to Open the Proceedings to the Public and News Media).

AL WINDLE: O.K.

THE COURT: That's what you get for volunteering information.

JOHN HASTY: Nobody's here from Bill's firm I take it.

AL WINDLE: You said something was denied, was it this motion?

THE COURT: Yeah, Yeah, Yeah, under the provisions of the law the matters dealing with peer review is closed and they objected to that.

APPENDIX L

Hearing May 7, 1996, Mecklenburg County Superior Court
Virmani v. Presbyterian Health Services Corp.

MR. ALLISON: Judge Gray's second order was entered by Judge Downs they both find that we were dealing with peer review information under G.S. 131E-95. That statute on the fact of it deems the peer review information to be confidential, privileged, not subject to discovery, and so both the prior orders referenced the confidentiality of the proceedings and agreed to in effect seal and protect the peer review information at both of the previous hearings we also did not permit anyone of the public to be at the hearing and we ask this on behalf of the Hospital and Mr. Sitton can speak for his, the plaintiff but -

JUDGE JOHNSON: Peer review information involves medical records of individuals who were patients of the Hospital and doctor.

MR. AHLUM: Essentially, what they involve Your Honor is the review process of a handful of physicians that are appointed to the review committee who look at records. The patients charts themselves would not be deemed confidential under the statutes but their analysis and their thought processes and their critique of the doctor involved are determined confidential. A lot of those records and some of those reports and findings will be brought up by us during the hearing and I know that the doctors that were involved in that it provides them confidentiality under the statutes to promote candor and to prevent inhibiting objectivity. That someone be not publish what they say about one of their peers doctors, that's the concern from the physician's standpoint. I don't want to speak on behalf of the plaintiff here, but I would imagine they would

probably agree that this information isn't something that needs to be published in the Charlotte Observer.

JUDGE JOHNSON: Well who is requesting that the proceeding be closed, which side?

MR. ALLISON: We are requesting - the defendant Presbyterian Hospital Corp. is requesting that the proceeding be closed as in accordance with the or as was done previously with Judge Gray and Judge Downs.

JUDGE JOHNSON: What statutory provisions would they rely upon?

MR. ALLISON: 131E-95 which is under tabs B in the book which you -

JUDGE JOHNSON: The only tabs I see that got numbers on them -

MR. ALLISON: I think we have an additional submission Your Honor.

MR. ALLISON: There was also a separate order entered by Judge Downs the same day of the hearing separate from his order dissolving the restraining order and denying the preliminary injunction. The order basically said that he found that the information was not public records and that it should be under seal and deemed confidential. This is a copy of the Judge Downs order; that is the protective order where he found that the proceedings were confidential and privileged.

JUDGE JOHNSON: All right it would appear from the nature of the proceedings that the same areas was previously

Judge Downs regarding peer review - statements made pursuant to the - as part of the peer review process of the defendant the same materials which would constitute the substantive evidence or evidence relied upon for purposes of

and the process itself be matters relied upon by both parties and referred to by both parties in this hearing. Therefore the same considerations of will be applicable so therefore I will enter the same order with respect to this proceeding that the proceeding is closed to the public. If during the proceeding it should be discovered that its not such, I will order it open but it would appear to me at this time that this peer review material is a substantial part of this hearing. Am I wrong? I am assuming that from the nature of this proceeding . . .

MR. AHLUM: I don't think so Your Honor. We will be referring to information that was generated during the peer review process and that information is deemed to be confidential under the statute, and I believe Mr. Sitton would probably be offering this information that was generated during that process too, but I don't know what his argument will entail.

JUDGE JOHNSON: Is that correct, Mr. Sitton?

MR. SITTON: I will be referring to those types of documents, yes sir.

JUDGE JOHNSON: O.K. Based upon the same then, it is ordered that this hearing is closed to the public. We will take a recess now and resume.

JUDGE JOHNSON: Proceeding with the matter of Virmani v. Presbyterian Health Services. We will hear from the plaintiff. On the motion for summary judgment. Now are you, is this just for a permanent injunction?

MR. AHLUM: No Your Honor. This is for a summary judgment.

JUDGE JOHNSON: But the complaint was for injunctive relief.

MR. AHLUM: That's right. Breach of contract; motion for temporary restraining order and a motion for preliminary injunction.

JUDGE JOHNSON: So then you're proceeding on summary judgment, on your breach of contract?

MR. SITTON: That's right Your Honor. I am asking for summary judgment on my breach of contract claim. I am also defending their motion for summary judgment and motion to dismiss.

JUDGE JOHNSON: O.K. I have got to let that sink in because I - in reading it all - I just got the impression that you know we were going to be hearing their injunction motion and

MR. AHLUM: Did you have a chance Your Honor to review any of the briefs that were submitted in support or in opposition to the summary judgment?

BENCH CONFERENCE

JUDGE JOHNSON: So they prayer for relief is for damages also, or is it just, assuming that there is a finding in favor of the plaintiff, are you seeking damages? What is your relief other than -

MR. SITTON: Your Honor, it includes several claims for relief. First claim for relief was a breach of contract claim based upon the fact that the suspension was in violation of the by-laws of the hospital. The first claim for relief begins on page 12 of my complaint.

JUDGE JOHNSON: O.K.

MR. SITTON: Now I also asked for injunctive relief and the third paragraph of my addendum clause, I asked for preliminary injunction relief, and I ask the court to enjoin the defendant from suspending the plaintiff except in accordance with the rights, duties and obligations of the medical staff by-laws. So I asked for relief for breach of contract. I asked for damages. I asked for injunctive relief. Now, Your Honor, there is no fixed method for computing damages and I don't expect the court to enter summary judgment in a fixed amount in favor of the plaintiff. However, I will take this position that we are entitled to judgment as a matter of law based upon the breach of contract claim. We are also entitled to injunctive relief to the extent that the plaintiff not be suspended except in accordance with the medical staff by-laws. I am not asking the court to enter an order that the hospital never suspend the plaintiff. I am simply saying that - asking that he not be suspended except in accordance with the by-laws.

MR. SITTON: Your Honor, my reading of the complaint was a little different. I understood that there was a claim for breach of contract and a seeking of damages. However, if you look at the second claim for relief which appears on our page 13 of the complaint -

JUDGE JOHNSON: Is that one of your exhibits?

MR. AHLUM: I didn't include the complaint, Your Honor. I apologize for that.

MR. SITTON: Your Honor, it's in the inside cover of that notebook I handed up to the court. It is right here. That's the complaint.

MR. AHLUM: The second claim for relief specifically states it's a motion for a TRO and a preliminary injunction and its our position that the motion for a restraining order has already been heard and that the motion for preliminary

injunction has already been heard. Reading the complaint I don't see any request for a permanent injunction and Judge Downs when he entered his order indicated that all injunctive relief was denied. I think the only thing that remains is the breach of contract action and that is what we are hear to go on today. I don't think we were defending an injunctive action which has already been denied, and there is no reference in the complaint as far as I can see to a permanent injunction. It was all preliminary in nature and that's already been ruled upon.

MR. SITTON: Well Your Honor, what I am asking for, if the court can make it's decision - when is this hearing reached the point where it's closed?

JUDGE JOHNSON: Well, whenever you - somebody decides to start talking about peer review. Either side but my - your last statement was that - O.K. you don't understand it that you're here for summary judgment on breach of contract? And that your also seeking - well I guess in either way a breach would have to be found before consideration is even given to any kind of permanent injunctive relief so I guess we don't have to deal with that. Now well anyway whether or not that has properly been brought before the court - if you were to prevail on the breach of contract, then you would be entitled to file it - a motion in the cause anyway - to protect rights pursuant to the contractual interests so -

MR. AHLUM: Your Honor, this is defendant's motion for summary judgment on the breach of contract claim, and I am really going to start off right out of the chute getting into peer review information. Now within the first thirty seconds - now what I'm saying is going to based on peer review information so I guess we better -

JUDGE JOHNSON: All right. Sir, what is your name?

MR. HECHINGER: John Hechinger, with The Charlotte Observer.

JUDGE JOHNSON: All right, do you ---

MR. SITTON: Your Honor -

MR. HECHINGER: Your Honor, would this be the time for me to make a formal objection to the closing?

JUDGE JOHNSON: Yes sir, so the objection of the Charlotte Observer is noted.

MR. H ECHINGER: Is there any way we can request a continuance of this so that our counsel will have time to make formal arguments against -- closure of this hearing?

JUDGE JOHNSON: No sir. I mean I note your objection. I note your request for a hearing; I mean for a continuance.

MR. HECHINGER: Thank you Your Honor. (Mr. Hechinger exits courtroom.)

MR. ALLISON: Your Honor if I could - again, I'm Jim Allison, one of the attorneys for the hospital and with us is Paul Betsel who is President of Presbyterian Hospital.

JUDGE JOHNSON: Lock that door back there now.

MR. AHLUM: Your Honor my name is Greg Ahlum of Johnston, Taylor, Allison and . . . . . .

END OF VIDEOTAPE

APPENDIX M

Hearing February 9, 1996, Mecklenburg County Superior Court Virmani v. Presbyterian Health Services Corp.

MR. SITTON, PLAINTIFF'S LAWYER: These are the exhibits to my complaint - I thought it would be easier if I just handed up a separate copy so that you could -

JUDGE DOWNS: All right.

MR. ALLISON, DEFENDANT'S LAWYER: Please could I address the matter on confidentiality --

Judge, if it please the court - My name is Jim Allison. I am here on behalf representing Presbyterian Hospital; along with Greg Ahlum, my partner; Paul Betsel is here; he is president of Presbyterian Hospital. The matters you are getting ready to hear involve peer review materials of which we consider to be of a sensitive nature they are protected under G.S. 131E-95. And we would ask that the court seal any peer review materials because those materials we think could be detrimental to both the Hospital and to Dr. Virmani so we would - we made this request at the temporary restraining order at the motion for that Judge Gray was inclined to seal the exhibits to the complaint which contained the peer review materials. We are not asking that anything that is not peer review be sealed.

JUDGE DOWNS: I will - I don't mind to seal it. That's not - That's fine. I -

MR. ALLISON: I have prepared an order.

JUDGE DOWNS: I'm not going to cull between what is and what isn't. We'll just seal it all.

MR. ALLISON: That's fine; that's fine; we have an order.

JUDGE DOWNS: Whatever the court does - in terms of fact finding and conclusions of this thing are not binding anyway. That's just strictly interlocutory, isn't it.

MR. ALLISON: That's correct. We just simply didn't want the record open to the public.

JUDGE DOWNS: Well now the only thing that you gotta do to the thing and not - - The record is on this TV thing going on. There's no court reporter you understand. And I don't know anybody that I know of that dim witted enough to come in here and start looking at this just because they've got nothing else to do.

MR. ALLISON: Yes sir.

JUDGE DOWNS: Maybe there's that type of human out there - I don't know maybe I haven't seen them yet. If they are, well.

MR. ALLISON: I think it would suffice if any type pleadings that are put in the file and that are peer review be sealed.

JUDGE DOWNS: All right. Bill, you got any objections to that?

MR. SITTON: For the sake of time, no Your Honor.

MR. ALLISON: Thank you Judge.

MR. SITTON: Their right to seal records in this case as Your Honor knows is a statute, Chapter 1, that severely restricts a Judge's power to seal records and says that if the records are sealed beyond the scope of this statute, they are null and void. Judge, this man was the subject of the peer review. He is not an outsider. The Shelton case says that the statute is intended to protect external review of these records, meaning if a plaintiff a patient of Dr. Virmani sues him and the Hospital

they can't get these peer review material. Now to the extent that the documents as exhibits are peer review documents, Judge Gray has already dealt with that. He has sealed those exhibits. But Judge, they are not entitled to a blanket seal on this entire process when the plaintiff was the subject of the peer review. He is not a medical negligence plaintiff.

MR. AHLUM: We are not asking for an entire seal. We are only asking for that the affidavit that we submitted of one of the exhibits of your complaint be sealed. With regard to the statute that Mr. Sitton refers to that deals with public records, I believe under that G.S. 131-95 that the peer review committee records are deemed not public records. So we now to the extent that the affidavits; the attachments to the exhibits which are all stamped confidential peer review material; the report by the hearing examiners; that that be something not be left in the public records for the sole purpose of kind of defeats the purpose and intent behind the peer review statute which is to promote candor among physicians that are involved in the proceedings and the order that we handed up or that we would hand up would only address those items that we submitted today.

MR. SITTON: All right Your Honor - that's fine. That's fine.

JUDGE DOWNS: Look at - look at it between yourselves.

MR. AHLUM: Look at it - s I would ---

MR. SITTON: Can I look at it?

MR. SITTON: Your Honor, I don't object to that.

JUDGE DOWNS: You do not?

MR. SITTON: No sir. It is fine to sign.

JUDGE DOWNS: All right.

JUDGE DOWNS: All right - I will see you when I see you.

MR. ALLISON: Judge, thank you very much for giving us this much time.

MR. ALLISON: Appreciate it.

APPENDIX N

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,

Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,

Defendant.

FILED May 22 1996

INVENTORY OF SEALED/CONFIDENTIAL MEDICAL REVIEW COMMITTEE DOCUMENTS AND PHYSICIAN CREDENTIALLING RECORDS

COMES NOW Defendant, Presbyterian Health Services Corp., pursuant to the Order of the Honorable James U. Downs, Superior Court Judge Presiding, dated May 22, 1996, after consulting with and receiving consent of counsel for Plaintiff, A. Ron Virmani, M.D., and hereby submits the following inventory of confidential and non-public Medical Peer Review Committee records and physician credentialling records placed under seal.

1. A white, sealed envelope marked "Confidential" containing a gray notebook, a cover letter dated February 7, 1996, Affidavits and legal memorandum handed to Judge

Downs on February 9, 1996 after closure of the proceedings and sealing of the documents. The gray notebook and other documents were not filed-stamped or filed with the Clerk of Court.

(a) The gray notebook contains the following Medical Review Committee and physician credentialling information:

INDEX (of Gray Notebook)

A: Report and Findings of Hearing Committee (Medical Review Committee findings)

B: Excerpts From Hearing Transcript (Medical Review Committee hearing)

C: Chronology of Events (Medical Review Committee events)

D: Affidavit of Paul F. Betzold (containing findings, notes, documents and records produced or prepared by Medical Review Committee and in connection with the credentialling of Dr. Virmani)

E: Affidavit of Ronald L. Brown, M.D. (containing findings, notes, documents and records produced or prepared by Medical Review Committee and in connection with the credentialling of Dr. Virmani)

F. Excerpts from Medical Staff Bylaws. (These documents are not confidential Medical Peer Review Committee documents.)

G. N.C.G.S. § 131E-95. (These documents are not confidential Medical Peer Review Committee documents.)

H. Health Care Quality Improvement Act; 42 U.S.C. § 11101-11112. (These documents are not confidential Medical Peer Review Committee documents.)

I. Affidavit of Lynda H. James. (This document is not a confidential Medical Peer Review Committee document.)

J. Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction.

(b) The white, sealed envelope marked "Confidential" also contained the following:

(1) A letter to Judge Downs from James Allison dated February 7, 1996 (This document is not a confidential Medical Peer Review Committee document.);

(2) An additional copy of the Affidavit of Paul F. Betzold (See above);

(3) An additional copy of the Affidavit of Ronald L. Brown, M.D. (See above);

(4) An additional copy of the Affidavit of Lynda H. James (This document is not a confidential Medical Peer Review Committee document); and

(5) An additional copy of Defendant's Memorandum in Opposition to Motion for Preliminary Injunction.

2. A brown, sealed manilla envelope containing Exhibits 1-9 submitted by Plaintiff. Exhibits 2, 3, 5, 6, 7 & 8 are memorandum, correspondence, charts, minutes and records prepared or produced by the Medical Peer Review Committee during the peer review of Dr. Virmani. These Exhibits also

contain records, documents and information produced and acquired in connection with the credentialling of Dr. Virmani. The remaining Exhibits 1, 4 & 9 submitted by the Plaintiff are not confidential Medical Review Committee documents.

This the 22nd day of May, 1996.

/s/ Greg C. Ahlum

Greg C. Ahlum, NC State Bar #14021
JOHNSTON, TAYLOR, ALLISON & HORD
610 East Morehead Street (28202)
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Attorney For Defendant,
Presbyterian Health Services Corp.

APPENDIX O

JOHNSTON, TAYLOR, ALLISON & HORD
PROFESSIONAL ASSOCIATION
[Letterhead Omitted in Printing]

February 7, 1996

Judge James Hugh Downs
Superior Court Judges Office
700 East Fourth Street
Charlotte, North Carolina
28202

PRIVILEGED
AND
CONFIDENTIAL

Re: *A. Ron Virmani, M.D. v. Presbyterian Health Services Corp.*, 96-CvS-644

Dear Judge Downs:

Enclosed are the following:

1. Affidavit of Paul F. Betzold;
2. Affidavit of Ronald L. Brown, M.D.;
3. Affidavit of Lynda H. James; and
4. Defendant's Memorandum in Opposition to Motion for Preliminary Injunction.

We have not filed these documents with the Court because they contain protected peer review information under *N.C.G.S. § 131 E-95.* At the TRO hearing, Judge Gray ordered that the exhibits to the Complaint be sealed, but he made no provision for how future documents relating to this case would be handled. He also locked the courtroom and allowed only the lawyers and the parties to be present during the hearing. We are providing, but not filing, these documents in order that the

Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute. We will need to address issues relating to the confidentiality and privilege of the peer review process prior to the commencement of the hearing.

If you have any questions, or if we can be of any assistance, please do not hesitate to call.

Very truly yours,

JOHNSTON, TAYLOR, ALLISON & HORD

/s/ Jim Allison

James W. Allison

cc: (Via hand delivery) William Sitton

APPENDIX P

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

96-CVS-644

A. RON VIRMANI, M.D.,

Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,

Defendant.

FILED May 8 1996

MOTION FOR INTERVENTION AND MOTION TO OPEN THE PROCEEDINGS TO THE PUBLIC AND NEWS MEDIA

Now come Knight Publishing Company and John Hechinger a reporter for the CHARLOTTE OBSERVER, by and through their counsel, John H. Hasty, and respectfully move the court that they be allowed to intervene in the above captioned proceeding under Rule 24 of the North Carolina Rules of Civil Procedure for the limited purpose of objecting to the court's closure of these proceedings to the public and news media; to move to obtain copies of the transcript of the proceedings held in closed session; and to object, if necessary, to any future attempted closing of these proceedings to the public and media. In support of their motions, the intervenors show to the court the following.

FACTS

On May 7, 1996, the defendant's motion to dismiss and for summary judgment came on to be heard by the court and the hearing was commenced in open court. The defendant moved the court by oral motion, upon learning that the intervenor Hechinger was present in the court room, to close the proceedings, citing as cause for closure that the hearing would include the discussion of confidential documents. Without hearing and without any findings of fact or conclusions of law, the court granted the motion.

Some time later, after the intervenor Hechinger had the opportunity to speak to the Clerk of Court, he entered an objection to the proceedings being closed and the Court, again without hearing, without findings of fact or conclusions of law would not consider the objection and would not allow Hechinger to present argument or hold a hearing on the objection.

STANDING OF INTERVENORS AND RIGHT TO BE HEARD

The Knight Publishing Company is in the business of publishing the CHARLOTTE OBSERVER, a daily newspaper in the city of Charlotte, NC, John Hechinger is a reporter for the CHARLOTTE OBSERVER. Both of the intervenors are in the business of gathering news of newsworthy events in the Charlotte area and providing this news and information to the public. As such, the intervenors have the constitutional right to petition the court not to close these proceedings and to question the closure of these proceedings because closure of the proceedings to the public would deny them the protections guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the North Carolina Constitution. For this purpose, when an

objection is made it is incumbent upon the court to conduct a plenary hearing and to make the findings of fact and conclusions of law in accordance with the guidelines laid down by the Supreme Court of the United States. *Richmond Newspapers, Inc. v. Virginia, 100 S.Ct. 2814 (1980); Gannett v. DePasquale, 99 S.Ct. 2898 (1979); In re Edens, 290 N.C. 299 (1976).*

PRESUMPTION OF OPENNESS OF COURTS

Both the North Carolina Constitution and the First Amendment of the United States Constitution require a presumption that ***all*** court proceedings shall be open to the public, including the news media.

North Carolina Constitution. Article I, Section 18 of the North Carolina Constitution provides that:

"All Courts shall be open. . ."

The North Carolina Supreme Court has interpreted this constitutional provision to mean that the disposition of cases shall be conducted in open court. *In re Edens, 290 N.C. 299, (1976); Raper v. Berrier, 246 N.C. 193 (1957).*

Virtually identical language is contained in the constitutions of West Virginia, Ohio, Pennsylvania, and North Dakota whose courts have also held that their constitutions require a presumption of openness of court proceedings and records. *E. W. Scripts Company v. Fulton, 100 Ohio App. 157, (1955); Commonwealth v Klinger, 75 P.A.C. & C. 2d 664 (1976); Philadelphia Newspapers, Inc. v. Germon, 478 P.A. 484; Harold Mail v. Hamilton, 6 Med. L. Rptr. 1343 (W.Va. Sup. Ct. 1980); KFGO v. Rothe, 6 Med. L. Rptr. 2217 (ND Sup. Ct. 1980).*

North Carolina has a long tradition of conducting court proceedings in the open and in openness in conducting public proceedings as evidenced by its strong public records statutes and open meeting statutes; moreover, the Rules of Civil Procedure expressly recognize the openness of court records and proceedings in that they require the parties to seek protective orders from the court in order to seal documents or other testimony in civil cases.

The United States Constitution. The United States Supreme Court has often spoken on the issue of open court proceedings. While the Supreme Court has not yet ruled in a case involving a civil trial, it has noted that civil trials have been historically presumed open to the public. *Richmond Newspapers, Inc. v. Virginia, supra,* at Footnote 17 p. 1884 "historically both civil and criminal trials have been open"; *Gannett Co. v. DePasquale, supra,* at footnote 15 p. 625 "both civil and criminal trials have been open to the public."

Several Federal Circuit courts of the United States, including the 4th. Circuit, have held civil trials are presumptively open under the First Amendment of the United States Constitution. *Brown and Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983); Newman v Graddick, 696 F2d 796, (11th. Cir 1983); Publicker Indus. Inc. v. Cohen, 733 F.2d 1059 (3rd Cir. 1984); Stone v University of Maryland Medical System Corp., 855 F2d. 178 (4th. Cir. 1988); In the Matter of Continental Illinois Securities, 732 F2d 1302 (7th. Cir. 1984).*

As stated by the Supreme Court of the United States in *Nebraska Press Associations v. Stuart, 427 U.S. 539 (1967),* "secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competency and impartiality of judges. . ." With respect to judicial proceedings in particular, the function of the press serves to guarantee the

fairness of trial and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. *Cox Broadcasting v. Cohn, 420 U.S. 469 (1975).*

Other State Courts have held various types of civil proceedings to be constitutionally presumed open such as competency hearings (NY); pre-trial proceedings (PA); preliminary injunctions (UT); custody proceedings (NY); depositions (WA & NH).

The District courts of Mecklenburg County North Carolina, in an unappealed decision, have also held that the press and public have a presumptive right of access under the First Amendment of the United States Constitution and the North Carolina Constitution as well as under N.C.G.S 7A-109: *Smith v Smith,* 18 Med. L. Rptr. 1784, (NC 1991).

The Superior Court of Roberson County North Carolina, has also held that the North Carolina Constitution by "unambiguous provisions" establish the right of the public to attend court proceedings; *North Carolina v. Demery, 22 Med. L. Rptr. 2383 (NC 1994).*

STANDARDS FOR CLOSURE

The presumption of openness in court proceedings is not absolute; however in order for this court to close the proceedings in this matter, it must make detailed findings of fact and conclusions of law based upon a three (3) part test first enumerated by the Supreme Court of the United States in *Richmond Newspapers, Inc. v Virginia, supra,* and cases following, including *Press-Enterprises Company v. Superior Court of California, 478 U.S. 1 (1986)*

In order to support the closure of these proceedings or any portion thereof or the records introduced or considered by the court in reaching its decision, the North Carolina and United

States Constitutions require that the party seeking closure must prove by "Clear and substantial evidence":

1. That there is a substantial probability that irreparable damage to the parties' rights to an impartial hearing will result from conducting the proceeding in public or that confidential information such as trade secrets and similar matters which would unduly harm the parties would be disclosed.

2. That there is a substantial probability that all possible alternatives to closure such as, redaction, in camera viewing of documents by the court and other easily applied precautions, will not adequately protect the parties' rights to a fair hearing and protection of confidential information.

3. That there is a substantial probability that the type of closure proposed by the Court will be effective in protecting against the perceived harm presented by the moving party.

The defendant cannot meet its burden of proof on the above standards. First it should be noted that the documents and records introduced by the parties in previous hearing on this case were allowed to be public and were in fact the subject of news reports on this action in the past. These records included documents reporting on cases of the Plaintiff's together with the reports of the Defendant's Peer review committee. To the extent that these records form the basis for the Defendant's motion, it is moot. It is like trying to close the barn door after the cows are gone. This was precisely the same fact situation presented in the trial of Jim Bakker where the 4th. circuit ruled that closure, once the information has been made public, would be "wholly ineffectual" and as a result the standards for closure could not be met. *In re The Charlotte Observer, 882 F.2d 850 (4th Cir 1989)*

The statutes with regard to Peer Review Committees, N.C.G.S. 131E-95 et.seq. do not mandate closure of these

proceedings or the records introduced during the proceedings. Section 95 merely protects the Peer Review Committee from civil actions and exempts the documents they create from the public records laws. Likewise Sections 97.1 and .2 merely exempt personnel files from the public records laws. Nothing in these statutes mandates that these records are to maintain their confidentiality after they are introduced at trial before a court.

CONCLUSION

Nothing could be more newsworthy and of greater interest to the public than the operations of a public hospital and the doctors who work there; a hospital which vigorously advertises it services and doctors to the public as being the best. For the reasons stated above and to be stated at the hearing of this matter, the court should allow the intervenors to intervene for the purposes stated and should enter its order opening these proceedings and allowing a transcript of the proceedings already held in closed session to be freely obtained by the public.

Respectfully submitted this the 8th day of May, 1996.

/s/ John H. Hasty
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/s/ G. Bryan Adams
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APPENDIX Q

SUPREME COURT OF NORTH CAROLINA

No. 62PA97-2

A. RON VIRMANI, M.D.,

Plaintiff,

v.

PRESBYTERIAN HEALTH SERVICES CORP.,

Defendant.

In Re KNIGHT PUBLISHING COMPANY
D/B/A THE CHARLOTTE OBSERVER
AND JOHN HECHINGER

From Mecklenburg County
Case No. COA96-1051

BRIEF OF A. RON VIRMANI

[Index Omitted In Printing]

QUESTION PRESENTED

IS THE COURT OF APPEALS DECISION THAT THE CONSTITUTION OF THE STATE OF NORTH CAROLINA CREATES A STRONG PRESUMPTION THAT ALL COURTS AND THEIR RECORDS ARE OPEN TO THE PUBLIC CORRECT?

STATEMENT OF THE CASE

Dr. Virmani adopts the Appellee's statement of the case.

STATEMENT OF THE FACTS

Dr. Virmani adopts the Appellee's statement of the facts with the additional statement that Dr. Virmani at no time ever agreed to, joined in or supported the request of Presbyterian Hospital to seal the peer review documents that were entered into the court proceedings. In fact, Dr. Virmani strongly believes it is appropriate, necessary public policy to allow peer review proceedings in the courts of North Carolina to be subject to public scrutiny.

ARGUMENT

THE COURT OF APPEALS' DECISION IS CORRECT IN HOLDING THAT ARTICLE 1, SECTION 18 OF THE NORTH CAROLINA CONSTITUTION CREATES A STRONG PRESUMPTION THAT ALL COURTS AND THEIR RECORDS ARE OPEN TO THE PUBLIC

The Court of Appeals' decision is correct, well reasoned and the Supreme Court should adopt it with a *per curium* decision. Not only is the decision correct in its interpretation of the North Carolina Constitution, it is in keeping with the vast majority of Federal and State Courts who have come to pass on this issue.

We note with interest that the Appellant nowhere even mentions the Federal decisions, including the Fourth Circuit, holding a presumption of openness under the First Amendment to the United States Constitution. Apparently, the Appellant asks the Supreme Court of North Carolina to adopt a position contrary to the Federal decisions on the issue irrespective of Article VI of the United States Constitution.

The Appellant's position is untenable. They say that it is all right for them to present documents in support of their position to the Court, ask the Court to consider them in making a decision, yet not introduce them into evidence and have them considered in secret, sealed from the public. To follow this argument to its natural conclusion would mean that the Court of Appeals and the Supreme Court would have to have secret appeals with no record should one of the parties appeal. The case could never be reported and the decision of the appellate courts would be secret as well. Obviously, this cannot be and is not the case.

Presbyterian says that they must conduct their business and the court's business in secret, hidden from public view otherwise their system will not work. This is simply not supported by the record in this case. Contrary to the Appellant's statements to the court that public exposure will harm the peer review process and make it impossible for hospitals to find doctors willing to conduct peer reviews, Presbyterian has, in fact, initiated a second peer review process as ordered by the Superior Court in Mecklenburg County. They are even using local physicians.

The practice of medicine has changed substantially in Charlotte-Mecklenburg, North Carolina. No longer do the two major hospitals have a physician staff consisting primarily of Southern-born white physicians. Charlotte-Mecklenburg has become quite cosmopolitan, and physicians of African descent,

Asian descent, Latin descent and other nationalities are seeking staff privileges. Dr. Virmani is from India. The color of his hands he maintains had everything to do with the adverse peer review in the first proceeding in this case.

This is why opening the judicial process where a peer review has been challenged is critical to the public. The Charlotte-Mecklenburg citizenry is now mixed. These foreign-born albeit U.S. citizen physicians seeking staff privileges are also serving many Mecklenburg citizens of diverse backgrounds, including the native population. Those citizens need to be assured that the peer review process is used as a tool to improve heath care, not a sword to remove physicians of foreign descent simply because they compete with Presbyterian's recently purchased local physician groups.

Dr. Virmani believes the peer review process should be one designed to be rehabilitative, not punitive. The whole essence of Dr. Virmani's lawsuit to assist him in obtaining this second peer review was one in which Dr. Virmani has maintained he was discharged for the color of his hands, not his capability to practice gynecology.

By allowing the public, especially the media, to observe and view peer review information that has been introduced into evidence in a Superior Court, it provides a wonderful check and balance to make sure the peer review process is used for a legitimate purpose and not ethnic cleansing.

Since the original Superior Court proceeding granting a second peer review, both Presbyterian Hospital and Virmani are debating in public forums the rationales, reasonings and motives of the "Virmani case." This is healthy, appropriate, and worthy of the community's interest. Had not *The Charlotte Observer* published its articles, there would have been no

public debate, and there would have been no knowledge by the public of what Virmani maintains is a suspect peer review.

Although the practice of medicine is a privilege and a hospital is not obligated to grant hospital privileges to every M.D., nevertheless, the public does have a legitimate interest in making sure hospitals do not use the peer review process as a method of punishment, retaliation or limiting the staff to a culture that would deprive many Charlotte-Mecklenburg citizens of using a local physician of an ethnic background of their choosing.

If Presbyterian is permitted to hide their action in the courts under the perverted rubber stamp of "*confidential peer review*", it is prima facie bound to create distrust and suspicion among the public.

Allowing a megagiant hospital such as Presbyterian to use their own physicians to summarily dismiss a competitor from the marketplace under a veil of secrecy is hideous. Once the issue of peer review has been subject to the courts, it should be the public policy to mandate constitutional guarantees of public scrutiny.

This 19th day of May, 1998.

/s/ Tom Bush

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APPENDIX R

SECRET JUSTICE

Undisclosed settlements to lawsuits and closed-door proceedings shut out public scrutiny, reduce accountability and eliminate precedent. But that is just the way some litigants want it.

BY JOHN GIBEAUT

It cost plenty for reporter Kirsten B. Mitchell and her newspaper to tell readers about a $36 million secret settlement of an environmental lawsuit between Conoco Inc. and residents of a mobile home park in Wrightsboro, N.C.

U.S. District Judge W. Earl Britt found Mitchell and the Wilmington, N.C., *Morning Star* in civil contempt and ordered them to pay the oil company $500,000. Then, Britt fined Mitchell another $1,000 in late February for criminal contempt.

Her offense: Obtaining the settlement figure from a sealed file inadvertently handed her by a court clerk.

"I've never seen a case like this, where you're held in contempt for looking at a document the government gives you," says George Freeman, assistant general counsel for the newspaper's parent corporation, The New York Times Co.

Media lawyers say Mitchell is a casualty of an increasingly pervasive secret justice system that allows well-heeled or famous litigants to make private use of the public courts while the travails of ordinary citizens are revealed for all to see.

"That's an example of how bizarre things can get," says lawyer Jane E. Kirtley, executive director of the Reporters Committee for Freedom of the Press in Arlington, Va. "I would say it's reaching epidemic proportions."

But while Mitchell and the *Morning Star* may pay a high price, the cost of secret justice to the public ultimately may be even higher. Whether judges seal files, close courtrooms or allow anonymous jurors to hear cases, critics complain such practices erode public oversight and confidence in the system, and reduce accountability for some protected wrongdoers.

"People who can afford to buy secret justice do, and that's just not what our system's about," says lawyer Kelli L. Sager, who represents media interests in Los Angeles.

In the long run, critics say, such secrecy creates a two-tiered justice system, one for the rich and famous, and a second one for everyone else. And sometimes, as in the Conoco case and others, major public safety and consumer concerns are swept under the rug.

"There's this concern that public figures get to clean their laundry in a private or semi-private cubicle while everyone else has to use the Laundromat," says St. Paul, Minn., lawyer Paul R. Hannah, who concentrates on media and entertainment law. "If, in fact, justice is the great leveler, you no longer see a system that protects the weaker against the strong."

Concerns about secrecy are not just from nosy reporters and cranky editors trying to mind everyone's business but their own. New York lawyer Eugene R. Anderson recently filed an amicus brief on behalf of United Policy Holders, a public interest group that wanted to know what's contained in voluminous sealed files in litigation between the 3M Co. and its insurers over coverage for the company's potential liability

for silicone-gel breast implants. "I don't [care] about the media," Anderson says. "We represent policyholders. The insurance industry is the most secret industry in the world."

Still, media lawyers primarily form the front line. Although no figures are available, media lawyers across the country report increased problems in obtaining access to criminal and civil court proceedings and documents. Judges, often unaware of serious constitutional and other legal requirements, frequently close the system to public scrutiny, often simply because the parties to a case want it that way.

Sometimes celebrities don't even have to ask a court for help. Los Angeles prosecutors listed Steven Spielberg as "John Doe" in a case against a man accused of stalking the filmmaker, although Sager says there was no indication Spielberg requested anonymity.

Also in Los Angeles, a state judge partly closed a 1996 civil trial in which actress Sondra Locke accused her former lover Clint Eastwood of fraud. "Neither Eastwood nor Sondra Locke requested that the trial be closed," says Sager, who represents *The Los Angeles Times* and *California Community News* in an ongoing appeal on the access issue to the California Supreme Court.

As for Locke and Eastwood, they settled for--you guessed it--an undisclosed amount of money as jurors deliberated.

Notorious criminal defendants, too, can get some of the same advantages as celebrities when courts decide their fair trial rights are special enough to trump First Amendment rights. Convicted Oklahoma City bomber Timothy McVeigh and codefendant Terry Nichols were able to hide from view chunks of documents that routinely would have become public in other cases.

Money Talks

Perhaps the most troubling aspect of the latest wave of secrecy springs from cases involving large corporations that want to control costs and maintain solid public images while taking advantage of the finality of res judicata that only a public court can offer.

"I'm seeing this a lot," says Minneapolis lawyer Mark R. Anfinson. "I think it's becoming standard operating procedure, especially in complex commercial litigation."

While the U.S. Supreme Court has long held that the public has a nearly unqualified First Amendment right to attend all phases of criminal proceedings, it has issued no specific pronouncement regarding court files themselves or civil trials.

Thus, lower courts are all over the map when it comes to files and civil matters, with some finding varying degrees of First Amendment rights in individual areas, more limited common-law rights in others, and, in still others, no rights at all.

The California Supreme Court, however, is expected to decide this year whether a specific First Amendment right exists to attend civil trials in the Locke-Eastwood case. *KNBC-TV v. Superior Court*, No. S056924.

But the Minnesota Supreme Court in early March refused to hear arguments to unseal the 3M case. *State Insurance Co. v. Minnesota Mining and Manufacturing Co.*, Nos. C0 97-2257, C4 97-1872. Media lawyers were uncertain what they would do next in the case.

"If they rule there is no First Amendment right, we'll continue in a helluva mess until we get a definitive statement from the U.S. Supreme Court," says lawyer Richard M. Schmidt Jr. of Washington, D.C., counsel for the American Society of Newspaper Editors.

Observers and participants say the California case is especially important because the government, which is supposed to ensure openness, is pressing for secrecy instead of the parties. And the sheer scope of the Minnesota case starkly illustrates its public interest, they say.

"It's just astounding," says Anfinson, who represents the Minneapolis *Star Tribune* in the case against St. Paul-based 3M and the insurance companies. "It's far and away the most astonishing example of secret justice I've ever seen. It's truly mind-boggling. This is big-time litigation with lots of consequences for lots of people."

Different Drummer

Lawyers seeking closure for corporate clients pack a different agenda. Although legal arguments for closure typically center on the need for secrecy as an incentive to settle and courts' traditional deference to the parties' wishes, money lurks at the bottom.

In the Conoco case, 178 mobile home residents claimed leaks from one of the company's gas stations had polluted their drinking water. The deal in the case was struck last summer after a public trial that lasted more than a month and after the jury had found Conoco liable for the pollution. Jurors were considering punitive damages when the settlement came.

Conoco lawyer Jonathan D. Sasser of Raleigh, N.C., says the *Morning Star*'s disclosure of the settlement amount will cost the Houston-based company a pile because it's involved in about 50 similar cases.

"It increases the expectations of other plaintiffs and other plaintiffs lawyers," Sasser says. "We were harmed to the tune of millions of dollars. It will raise the value of settlements in the future and raise the costs of defending these cases."

The judge declined other requests by Conoco to find *Morning Star* reporter Cory Reiss in contempt and force him to identify two confidential sources who gave him the same information on the settlement figure. But it was the publication of Mitchell's information citing court documents that really stung, Sasser says. "That adds a degree of credibility to it."

Although Judge Britt wrote in his Jan. 21 civil contempt order that "this matter is not about the freedom of the press, but about the respect that any citizen, individual or corporate, should have for an order of the court," he also echoed Conoco's complaints. *Ashcraft v. Conoco, Inc.*, No. 7:95-CV-187-BR(3) (E.D.N.C.).

Although irrelevant to the contempt proceeding, newspaper lawyer Freeman says Conoco overlooks one significant factor: "None of this would have happened if the settlement hadn't been sealed in the first place."

Freeman, cochair of the ABA Litigation Section's First Amendment and media committee, says Mitchell had no reason to believe the settlement wasn't public because the clerk had pulled a different sealed document from the file before handing it to her.

Minneapolis lawyer Dale Larson, who represents 3M in the insurance case, tells of concerns similar to Conoco's. The 3M court file has to remain sealed, he says, because it contains privileged attorney work-product information, including strategy and defense costs in the separate breast-implant litigation. The insurers have a right to that information, but the plaintiffs in the underlying case do not, Larson says.

"If the insurance case was open while your suit was pending, the other party would have all your privileged and confidential information," Larson says.

He's especially steamed that one of those seeking access is Mealey Publications Inc., a suburban Philadelphia newsletter publisher that distributes dozens of titles dealing mostly with the insurance industry and litigation. As part of its service, Mealey sells copies of court documents to its readers. Some of those readers include plaintiffs lawyers, who Larson says aren't entitled to know 3M's secrets.

Give me a break, says Mealey's lawyer, Lee Levine of Washington, D.C. "The fact that readers of Mealey Publications include plaintiffs lawyers, who 3M assumes are evildoers, is basically irrelevant," Levine says. "They have no less right to information than anyone else."

Even accepting that 3M must surrender and keep secret some privileged materials, *Star Tribune* lawyer Anfinson wonders why it had to file them with the court in the first place. He has an even harder time swallowing the idea that the voluminous file is so rife with legitimately confidential stuff that it can't be weeded out.

Moreover, he says, the case also deals with the court's refusal to release transcripts of some hearings. Although the court maintains that those hearings were public, the docket scheduling them was not.

"That's one of the Alice-in- Wonderland aspects of this whole thing," Anfinson says.

Blame for the Bench

Still, critics don't blame secrecy all that much on lawyers seeking closure. For example, they say, a criminal defense lawyer runs a risk--albeit remote--of giving ineffective assistance by failing to ask for protective orders and other measures to guard his or her client's Sixth Amendment rights.

Judicial ignorance probably plays the most crucial role in expanding secrecy, critics say. They place much of the blame directly on judges who often agree to requests to seal off the system without even acknowledging the competing and, indeed, sometimes conflicting public interest in openness.

Closure orders typically arise out of stipulations reached by the parties and presented to unsuspecting judges who may not know any better, lawyers say.

That criticism is just too brutal, says Judge Michael G. Harrison, chair of the National Conference of State Trial Judges.

"Why is it so difficult to believe that a judge isn't familiar with something?" asks Harrison, a circuit judge from Lansing, Mich., who says he only rarely orders closure himself.

"There are thousands of issues that come up. You can't expect a judge to know about them all."

The system's pressure on judges to keep the docket moving and speed civil cases toward settlement also is key, says St. Paul lawyer Hannah, who waged an unsuccessful battle for newspapers and television stations in the Twin Cities area trying to lay their hands on a lawsuit involving the personal life of Minnesota Vikings coach Dennis Green.

"I hear more and more judges mumble that these are two private parties," Hannah says. "The feeling I get is that judges tend to look upon individual lawsuits as a dispute resolution process and not as an exercise of the power of the court."

Obtaining access is even harder these days because courts commonly close the system first without public notice and only entertain questions later. Although the bulk of First Amendment jurisprudence presumes an open system and

places the burden on the party seeking closure, the presumption and the burden often are flipped once a courtroom is closed or a document sealed. Making things even more difficult, lawyers trying to pry open cases often don't know exactly what they expect to find.

"Rarely do we know what we are looking for," Hannah says. "Our arguments are very general, and the response is much more specific.

"In the Dennis Green case, I felt I was tilting at windmills."

All the same, some news outlets are venturing into uncharted territory.

In Southern California, a coalition of influential media entities is trying to use an unusual feature in state law to unseal grand jury transcripts of an aborted criminal investigation of Merrill Lynch & Co. in connection with the 1994 Orange County bankruptcy.

In upstate New York, the 35,000-circulation Glens Falls *Post-Star* is appealing a federal judge's refusal to release documents from settlement discussions in an environmental case involving a town government and General Electric Co.

The New York case concerns allegations that GE dumped 452 tons of hazardous waste from 1958 to '68 at a disposal site in the town of Moreau, just north of Albany, and contaminated the town's drinking water. The newspaper tried to learn more last year when it heard a settlement may be near.

But the parties, including town officials, already had agreed to keep both negotiations and draft settlement documents secret, although they had publicly discussed the talks. That was enough for U.S. District Judge Lawrence E. Kahn to keep the paper out of settlement conferences and from getting

hold of the documents, which were given to the court clerk's office but not filed.

Settlement negotiations and documents traditionally have been private affairs, and few cases ever would settle if the parties had to deal publicly, Kahn wrote last September in *United States v. Town of Moreau*, 979 F. Supp. 129 (N.D.N.Y.).

Despite the inherent secrecy of settlement talks, a significant First Amendment card comes into play when they involve elected officials, says the paper's lawyer, Thomas F. Gleason of Albany. The case is pending before the 2nd U.S. Circuit Court of Appeals in New York City.

"The reason we thought it was important is because the settlements that were being bandied about, like million-dollar payments and a new water supply, have long-term implications for the town," Gleason says. "An essential tenet of our argument is that it was public officials acting."

In Orange County, news organizations are trying to use a provision of California law that allows release of grand jury transcripts once an indictment is issued.

The local district attorney began a criminal investigation after the 1994 bankruptcy, which cost cities, schools and county agencies $1.64 billion. As one of the county's financial advisers, Merrill Lynch was a target of the probe.

Sealed Settlement

But as a grand jury considered the case, Merrill Lynch and the district attorney reached a $30 million settlement in June 1997 that included a multimillion-dollar payment for costs to the prosecutor's office. The investigation ended and the grand jury records were sealed, until a trial judge ordered them opened in September.

The state supreme court spurned Merrill Lynch's protest and shipped the case to an intermediate appellate court, where it remained in late February. *In re Request for Transcripts of Phase Three Grand Jury Proceedings,* No. G022076 (Cal. Ct. App. 4th Dist.).

Although California normally does not release grand jury materials in cases that don't result in indictments, the Merrill Lynch case is different because of the settlement with the state, says media lawyer Sager.

"Here, the grand jury didn't get a chance to decide whether to issue an indictment," Sager says. "And here, Merrill Lynch paid millions of dollars, which suggests something was wrong. And the district attorney's office cut them a deal."

Meanwhile, the Wilmington *Morning Star* and the New York Times Co. are taking the *Conoco* contempt case to the 4th U.S. Circuit Court of Appeals in Richmond, Va.

As for reporter Mitchell, she carried a copy of the novel *Midnight in the Garden of Good and Evil* to her sentencing, perhaps in anticipation of hard time ahead.

But, besides the hefty fine, she got little else for her trouble. Her information accounted for only a tiny portion of the published story. She didn't even get a byline.

John Gibeaut is a reporter for the ABA Journal.

MOTION FILED

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No. 99-1011

IN THE

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY, d/b/a
THE CHARLOTTE OBSERVER,
and JOHN HECHINGER

Petitioners,

v.

PRESBYTERIAN HEALTH SERVICES CORP.

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

MOTION OF THE NEWS AND OBSERVER PUBLISHING COMPANY, INC. D/B/A *THE* (RALEIGH) *NEWS & OBSERVER* MEDIA GENERAL OPERATIONS, INC. AND THE NORTH CAROLINA PRESS ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF KNIGHT PUBLISHING COMPANY

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The News and Observer Publishing Company, Inc. d/b/a *The* (Raleigh) *News & Observer;* Media General Operations, Inc.; and the North Carolina Press Association respectfully move this Honorable Court for leave to file a brief *amicus curiae* in support of Knight Publishing Company's Petition for Writ of Certiorari. In support of this motion, the movants show unto the Court that:

The News and Observer Publishing Company publishes The Raleigh *News & Observer*, a daily newspaper of general circulation in Raleigh, North Carolina, and the surrounding areas.[1] *The News & Observer* participated as *amicus curiae* in the proceedings below. Media General Operations, Inc. publishes eight daily newspapers in North Carolina: the *Winston-Salem Journal*, a daily newspaper of general circulation in Winston-Salem and the surrounding areas; the *Independent Tribune*, in Concord and Kannapolis, the *Hickory Daily Record*; the *Statesville Record & Landmark*; *The News Herald* in Morganton; *The Reidsville Review*; *The Daily News* in Eden; and *The McDowell News* in Marion.[2] The North Carolina Press Association is a not-for-profit corporation and trade association whose members

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[1] The News and Observer Publishing Company, Inc. is owned by McClatchy Newspapers Incorporated, which owns six other North Carolina newspapers: the *Chapel Hill News*; the *Cary News*; the *Zebulon Record*; the *Wendell Clarion*; the *Knightdale Times*; and the *Smithfield Herald*.

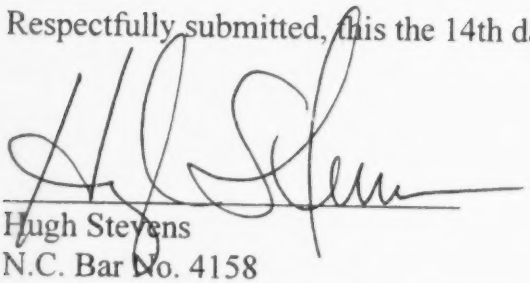
[2] Movant Media General is the same company that successfully petitioned this Court and established the public's right of access to criminal proceedings in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 284, 65 L. Ed.2d 973 (1980).

include 49 daily and 133 non-daily newspapers published throughout North Carolina. The association's members regularly attempt to cover the proceedings and activities of the state's courts; accordingly, the interpretation and application of First Amendment to the United States Constitution and Article I, §18 of the North Carolina Constitution are of great interest and importance to the Association and its member newspapers. The Association participated in this case as *amicus curiae* before the North Carolina Court of Appeals and the North Carolina Supreme Court.

Upon inquiry, Knight Publishing Company consented to Movants' filing a brief *amici curiae* and offered to consent, in reciprocity, to other parties' filings of a brief *amici curiae* in support of the Respondent. However, Presbyterian Health Services Corporation has refused to consent to Movants' participation as *amici*. Accordingly, Movants respectfully seek the Court's leave to file the accompanying brief *amici curiae* pursuant to Rule 37(2)(b) of the Supreme Court Rules. The Movants respectfully submit that they are uniquely qualified to explain the practical consequences of the North Carolina Supreme Court's paradoxical decision, which holds (1) that the press and public have a presumptive right, grounded in the North Carolina constitution, to attend and observe civil court proceedings, but (2) have no concomitant right to intervene or otherwise appear in civil trial court proceedings to protest actual or threatened closure orders.

In compliance with Rule 37(2)(b), the Movants' proposed brief is incorporated in this Motion.

Respectfully submitted, this the 14th day of January, 2000.



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INTEREST OF THE *AMICI*

The News and Observer Publishing Company, Inc. d/b/a *The News & Observer;* Media General Operations, Inc.; and the North Carolina Press Association respectfully submit this brief as *amici curiae*.[1] The News and Observer Publishing Company publishes *The News & Observer*, a daily newspaper of general circulation in Raleigh, North Carolina, and the surrounding areas. Media General Operations, Inc. publishes the *Winston-Salem Journal*, a daily newspaper of general circulation in Winston-Salem, North Carolina, and surrounding areas, and seven other daily newspapers in North Carolina. The North Carolina Press Association is a not-for-profit corporation and trade association whose members include 49 daily and 133 non-daily newspapers published throughout North Carolina. The Association's members regularly attempt to cover the proceedings and activities of the state's courts; accordingly, the interpretation and application of the First Amendment to the United States Constitution and Article I, §18 of the North Carolina Constitution are of great interest and importance to the Association and its member newspapers.. The NCPA has participated in this case as *amicus curiae* at the North Carolina Court of Appeals and Supreme Court levels.

SUMMARY OF ARGUMENT

This Court's rulings in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 284, 65 L. Ed.2d 973

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[1] Undersigned counsel authored this brief in full, and no party other than named *amici* have contributed monetarily to its preparation or submission.

(1980), Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), 102 S. Ct. 2613, 73 L. Ed. 2d 248, Press-Enterprise Co. v. Superior Court of Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), and Press-Enterprise Co. v. Superior Court of Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986), have firmly established the constitutional principle that judges may not close criminal trials and proceedings and exclude the public except for extraordinarily compelling reasons and in compliance with significant procedural safeguards. This Court has not, however, had the opportunity to address application of those same principles to context of civil proceedings.

This Court has written that "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.'" Mills v. Alabama, 384 U.S. 214, 218, 86 S. Ct. 1434, 1436, 16 L. Ed. 2d 484 (1966)). In contemporary society, few governmental activities affect more people more directly than civil trial courts. Although criminal cases -- especially "high profile" murder trials -- grab a disproportionate share of tabloid headlines, responsible news organizations also attempt to inform their audiences about toxic tort suits in which the defendants are alleged to have contaminated drinking water, litigation over whether tobacco settlement monies should be used to reimburse public health expenditures or to compensate displaced tobacco farmers, class actions alleging systematic racial discrimination by a national car rental company, challenges to congressional redistricting schemes, and constitutional decisions ordering refunds of hundreds of millions of dollars of state and local taxes -- just to mention a few of the subjects confronted recently by North Carolina civil courts. Given the

scope and importance of the issues that our civil courts are called upon to resolve, it is time -- indeed, *amici* respectfully submit that it is long past time -- for this Court unequivocally to extend the principles articulated in Richmond Newspapers and its progeny to civil court proceedings.

The decision of the North Carolina Supreme Court that *The Charlotte Observer* has petitioned this Court to review notes that this Court has not clearly stated whether the qualified right of access grounded in the U.S. Constitution extends to civil proceedings but holds that the North Carolina Constitution creates a parallel right of access to civil proceedings in this State. Having found that the right exists, however, the opinion simultaneously emasculates it by holding that a non-party has no right to appear and advocate for openness before a trial judge who has closed, or who may be about to close, a civil hearing. Such an anomalous holding clearly ignores this Court's admonition that "[t]he fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914). Compounding its errors, the state court further curtailed the putative right of access by holding that a trial court may avoid public scrutiny of its actions by permitting a party to hand up inadmissible exhibits and considering them *ex parte* without making them part of the court file.

A "right" so empty of meaning and practicality is illusory, and an opinion that renders a constitutional right so impotent is itself constitutionally untenable. Therefore, *amici* respectfully urge this Court to grant *certiorari* to review the decision of the North Carolina Supreme Court.

ARGUMENT

In the series of opinions beginning with Richmond Newspapers, this Court held that the First Amendment implicitly creates a presumptive right of the public and the press to attend and observe the proceedings in criminal cases, including trials, pre-trial hearings, and jury selection. These opinions also hold that because of this presumptive constitutional right of public access, a criminal proceeding may be closed only if the presiding judge, after a hearing, enters specific written findings demonstrating (1) that closure is absolutely necessary to protect a "compelling" governmental interest; (2) that no less restrictive measure will suffice; and (3) that the closure is "narrowly tailored" so that its scope and duration are as limited as possible. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed.2d 248 (1982); Press-Enterprise Co. v. Superior Court of Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984); and Press-Enterprise Co. v. Superior Court of Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986).

In light of the requirements (1) that the moving party adduce factual evidence justifying closure, (2) that the court make specific factual findings and embody them in writing, and (3) that any closure order be "narrowly tailored," it is clear that under the U.S. constitutional standard, the court must conduct a fact-finding hearing, and require the movant to justify closure, with respect to each individual proceeding for which closure is sought. "If the interest asserted is the right of the accused to a fair trial, the preliminary hearing

shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." Press Enterprise II, 478 U.S. at 14, 106 S. Ct. 2742.

The trial court in this case undertook no factual investigation, legal balancing or inquiry whatsoever before denying the public their right of access. Not only are the closure and sealing orders entered by the three trial judges below constitutionally defective in substance; they are also defective procedurally, because all three judges summarily abrogated the Petitioners' constitutional rights by refusing to hear them; indeed, any fair reading of the record reveals that the trial judges treated the Petitioners' requests with utter disdain and treated their attempt to assert their state and federal constitutional rights as an annoyance. None of the judges undertook any balancing test, made any factual findings or tailored the closure order narrowly to protect the legitimate interest of the petitioners. They not only declined Petitioners' request to open the courtroom and unseal the records; they slammed the door in their faces and treated them as interlopers. By proceeding in this fashion the trial judges flagrantly and arrogantly violated petitioners' rights under the North Carolina and United States constitutions.

The North Carolina Supreme Court assumed for purposes of this case that this Court "would hold that the qualified First Amendment right of public access applies to civil cases," and the court recognized that the open courts provision of Article I, Section 18 of the North Carolina

Constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings. However, in silencing the voice of any party wishing to exercise those rights, the North Carolina court effectively has denied them.

Though access rights are enjoyed by the public at large, it has long been recognized that the media often serve as the eyes and ears of the public in reporting judicial proceedings. As this Court has held:

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public.

Richmond Newspapers, Inc., v. of Virginia, 448 U.S. 555, 572, 573, 100 S. Ct. 2814, 2825, 65 L. Ed.2d 973 (1980). There can be no question that the media stand in the shoes of the public and that it is primarily through their efforts that the public has access to observe the judicial process. It is vital, therefore, that the media and the public have a mechanism for voicing, asserting and exercising their and the public's right of access. The North Carolina Supreme Court's decision holds that a citizen of North Carolina is not entitled to intervene in a civil proceeding to assert the very right of access that the Court has found to exist. This holding is in error, because it misapprehends and misapplies Rule 24(a) of the Rules of Civil Procedure but more importantly because it denies fundamental due process by depriving citizens of any practical procedure for asserting their right of access and

preventing its abuse or infringement by a trial court.

As this Court has held in the context of civil rights and voting rights, a state may not erect procedural obstacles to stop the exercise of constitutionally protected freedoms. In State of South Carolina, v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed.2d 769 (1966), this Court upheld the Voting Rights Act elimination of states' literacy tests and other procedural predicates to registration to vote.

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S. Ct. 125, 130, 5 L. Ed. 110 (1960). When North Carolina's interpretation of state rules of civil procedure infringes on the public's exercise of its rights of access to view and review judicial proceedings, that becomes a federal issue that should be addressed and rectified by this Court.

In denying Petitioner the right to intervene, the North Carolina Supreme Court alludes to alternate processes by which the Court suggests Petitioner might challenge a trial court's closure. However, even if those means are available under North Carolina's Rules of Civil Procedure, each nonetheless would deprive the public of meaningful, *contemporaneous* access to judicial proceedings. Courts consistently have held that contemporaneous access is vital to the right of access. The Third Circuit has recognized the inimitable value of first-hand access to judicial proceedings:

> [T]he United States' contention that the district court's release of the transcript was adequate to cure any unjustified restrictions on the right of access . . relies on the Supreme Court's statement that in some instances "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time...." Press-Enterprise I . .
>
> * * *
>
> [B]ut, as the Fourth Circuit has observed, this argument "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for public disclosure." In re Charlotte Observer, 882 F.2d 850, 856 (4th Cir.1989). Furthermore, a transcript is not the equivalent of presence at a proceeding; it does not reflect the numerous verbal and non-verbal cues that aid in the interpretation of meaning. Thus closure will in many cases effectively prevent the public from receiving information that contributes to the news value of a proceeding.

United States v. Simone, 14 F.3d 833, 842 (3d Cir. 1994) (citations omitted). Likewise, the Second Circuit has cited the "significant public interest in affording that opportunity contemporaneously," National Broadcasting Company, Inc. v. Myers, 635 F.2d 945, 952 (2d Cir. 1980):

> Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence . . .

Id. (citations omitted). Or as the Third Circuit wrote in the "Crazy Eddy" case:

> We emphasize, however, that documentary access is not a substitute for concurrent access, and vice versa. The right of access encompasses both forms, and both are vitally important. . . . [A] transcript would not fully implement the right of access because some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript.

United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994).

In a host of North Carolina cases, the media's ability to intervene has proven critical, not only because the rights asserted were grounded in the state and federal constitutions, but also because intervention permitted the news organizations to timely raise these issues in the trial courts whose actions or potential actions infringed or threatened to infringe their and the public's rights of access. State v. Kelly, 91 CRS 4250-4363 (Superior Court of Pitt County), 19 Media L. Rep. (BNA) 1285, State v. Demery, 93 CRS 15288-90

(Superior Court of Robeson County), 22 Media L. Rep. (BNA) 2383, In re the Subpoena of Laura Hart McKinny from the State of California, (Superior Court of Forsyth County, 1995), State v. Underwood, 95 CRS 4689 (Superior Court of Watauga County), Carter, et al. v. Woodard, et al., 98 CRS 1120 (Superior Court of Wilson County), "Publius Heterodoxus" v. Town of Chapel Hill, 96 CVS 1433 (Superior Court of Orange County), State v. Williamson, 95 CRS 865, 866 and 3738-50 (Superior Court of Orange County), Pugh, et al. v. Avis Rent A Car System, et al., No. 7:96-CV-91-F(2) (United States District Court for the Eastern District of North Carolina), Wilson v. State of North Carolina, No. 5:94-CV-8788BR3 (United States District Court for the Eastern District of North Carolina). In each of these cases the media's intervention led to a prompt hearing and immediate resolution of the access issues, and in none of them was it necessary for any party to burden the appellate courts with these issues.

Without the means of directly and immediately objecting to closure of a judicial proceeding or sealing of judicial records *as it is occurring*, the public will not be afforded true access and will -- at best -- be relegated to a cold, after-the-fact record of what transpired.

The Court further erred in this case by holding that news organizations or other citizens who move to intervene for the purpose of asserting their state and federal constitutional rights of access do not assert "a direct or substantial interest" sufficient to invoke Rule 24(a). When a trial judge has closed, or is threatening to close, a courtroom or a court record, the public's access rights are directly and immediately implicated; moreover, because those rights arise

under the state and federal constitutions, they are manifestly "substantial." Practically speaking, if news organizations or other citizens cannot intervene to protect these constitutional rights, they frequently will have no protection at all at the trial level; indeed, they are likely to be disregarded altogether.

The many decisions of the circuit courts are correct in holding that any documents and evidence tendered to a trial court for its use in determining the substantive issues before it, whether filed or not, become the public records of that court. The North Carolina Supreme Court's decision that one party to litigation can exclude evidence from the other party in the action, and from the public, while at the same time presenting it to the trial court as evidence on the substantive issues to be determined by the trial court is in error. Contrary to the Court's decision, N.C.G.S. 1A-1, Rule 5(e)(1) does not condone or provide for such a practice. The Court's decision that N.C.G.S. § 131E-95 makes peer review information inadmissible in all civil cases is doubtful at best, having so held, however, it was error for the North Carolina Supreme Court to then conclude that the hospital could, nonetheless, tender this inadmissible information to the trial court for its *ex parte* consideration determining the substantive issues of the case, to the exclusion of the plaintiff, the public and the court record.

CONCLUSION

Amici respectfully submit that in addition to vacating the patently unconstitutional orders issued by the trial court judges, this Court should remand this case to the trial court with a stern admonition to trial judges that motions to intervene and petitions for relief predicated on the First

Amendment to the United States Constitution and on Article I, Section 18 of the Constitution of North Carolina may never be shrugged off as irritants or nuisances.

Respectfully submitted, this the 14th day of January, 2000.

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Supreme Court, U.S.
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(3)

No. 99-1011

IN THE

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY and JOHN HECHINGER,

Petitioners,

v.

NOVANT HEALTH SOUTHERN PIEDMONT REGION, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to review the decision of the Supreme Court of North Carolina because it is based on an independent and adequate state law ground?

2. Did the Supreme Court of North Carolina limit Petitioners' right of access to civil court proceedings and records in a manner that is narrowly drawn, consistent with First Amendment case law and does not call for review by this Court?

STATEMENT PURSUANT TO RULE 29.6

Presbyterian Health Services Corp., the original defendant in this case, has been acquired and is now Novant Health Southern Piedmont Region, LLC, a North Carolina limited liability corporation which operates two hospitals in the Charlotte, North Carolina area. Its parent corporation is Novant Health, Inc. and there are no publicly held companies that own 10% or more of the stock of the Respondent.

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The Respondent, Novant Health Southern Piedmont Region, LLC, respectfully requests that this Court deny the petition for writ of certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF JURISDICTION

Although Petitioners contend that jurisdiction exists pursuant to 28 U.S.C. § 1257 (1994), this Court should not review the decision rendered by the Supreme Court of North Carolina because it is based on adequate and independent state law grounds.

STATEMENT OF THE CASE

This case arises out of issues of state law — the application of North Carolina General Statutes § 131E-95 to Petitioners' attempt to gain access to the confidential records and information generated by a medical peer review committee. That committee was appointed by Respondent's hospital to evaluate the competence of A. Ron Virmani, M.D., a physician on its medical staff. Under Section 131E-95, the records prepared by the medical peer review committee are protected as confidential.

In the underlying case, Dr. Virmani filed suit against Respondent challenging its decision to terminate his clinical privileges to practice medicine at Respondent's hospital. Dr. Virmani attached as exhibits to his complaint two peer review records, namely the peer review committee's report, which contained its confidential evaluation and conclusions regarding Dr. Virmani's competency, and its summary of its findings. Respondent promptly moved the trial court for an order sealing the confidential peer review records and

closing the courtroom during any discussion of the confidential information contained in the records. Thereafter, in order to respond effectively to the peer review records presented by Dr. Virmani, it was necessary for Respondent to submit certain additional peer review records to the trial court in conjunction with a motion to seal the records and to close the courtroom during discussion of the information contained in the records. Relying on the confidentiality requirements for peer review records set out in Section 131E-95, the trial court ordered those portions of the hearing concerning the peer review records closed to the public. Petitioner John Hechinger, a reporter for Petitioner Knight Publishing Company, objected to the closing. Subsequently, Petitioners filed a motion to intervene in Dr. Virmani's suit against Respondent to challenge the trial court's orders closing portions of the hearings and sealing the peer review records. Petitioners presented their motion to the trial court *ex parte*, without giving notice to the parties. The trial court ultimately denied the motion to intervene.

Petitioners then filed a notice of appeal and petitions for extraordinary writs, including a petition for writ of certiorari, with the North Carolina Court of Appeals. In its decision, the North Carolina Court of Appeals overturned the trial court's determinations, finding that the North Carolina Rules of Civil Procedure authorized Petitioners' intervention for the purpose of challenging the trial court's orders to seal records and close proceedings, and the North Carolina Constitution guarantees the public and the press a near-absolute right of access to all court proceedings and court records. The North Carolina Court of Appeals directed the trial court to unseal all of the confidential peer review records previously sealed.

Respondent sought review of the North Carolina constitutional and procedural issues in the North Carolina Supreme Court (hereinafter "the court"). The North Carolina Supreme Court heard argument and ruled on two legal issues: (1) the state procedural law issue of whether Petitioners were entitled to intervene in the state court action brought by Dr. Virmani; and (2) the substantive issue of whether Petitioners have an absolute right of access to court proceedings and court records. In a unanimous decision, the court determined that, under North Carolina law, the trial court properly denied Petitioners' motion to intervene in the proceedings. The court also decided that a presumptive right of access to state court proceedings and records exists under both the State and Federal Constitutions. Nonetheless, the court ruled that the compelling government interest in preserving the confidentiality of the peer review records at issue in this case outweighed the public's right of access to the closed portions of the hearing and the sealed peer review records. The court further held that, under North Carolina law, those peer review records which Dr. Virmani attached to his complaint and filed with the clerk of court became public records when they were filed and Petitioners were entitled to have access to them.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA BECAUSE IT IS BASED ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND

Notwithstanding the jurisdiction of the United States Supreme Court (hereinafter "this Court" or "the Court") to review decisions rendered by state courts set out in 28 U.S.C. § 1257(a) (1994), this Court has long held that it lacks jurisdiction to review a state court decision when it rests on an independent and adequate state law ground. *See Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Eustis v. Bolles*, 150 U.S. 361, 366 (1893). This Court has articulated the rationale for the independent and adequate state ground doctrine as follows:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). In other words, the Court will not review a state court decision if a reversal of the state court's ruling on federal law will not

alter the outcome in the case because the result is independently supported by the state court's decision on state law grounds. *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

In the seminal case *Michigan v. Long*, 463 U.S. 1032 (1983), this Court re-evaluated its approach to determining whether a state court decision is based on an independent and adequate state ground and adopted the "plain statement" rule. Under this rule, if the state court opinion indicates clearly and expressly that it is based on a "bona fide separate, adequate and independent state ground," this Court has no jurisdiction to review it. *Id.* at 1041. If, however, it is not clear from the opinion that the state court relied upon such a ground and if it fairly appears that the state court rested its decision primarily on federal law, the Court will assume that jurisdiction exists. *See id.* at 1042.

A. The North Carolina Supreme Court's Decision that Under State Procedural Law the Trial Court Properly Denied Petitioners' Motion to Intervene Constitutes an Independent and Adequate State Law Ground

In the present case, the opinion of the North Carolina Supreme Court expressly indicates that its ruling on Petitioners' motion to intervene is based squarely on state law. Petitioners sought to intervene to challenge the trial court's decision to close portions of the proceedings and seal certain records by filing a "motion for intervention and motion to open the proceedings to the public and news media." The trial court ultimately denied the motion.

In challenging the denial, Petitioners argued in the court below, and again in their Petition, that the trial court erred

in summarily denying their motion to intervene *and* motion to open the proceedings. However, as the North Carolina Supreme Court correctly recognized, Petitioners have mixed two different legal questions: (1) the state procedural law issue of whether Petitioners are entitled to intervene in this case; and (2) the state and federal constitutional issue of whether the trial court erred in closing the proceedings and records to the public. (Pet. App. at 11a.) The North Carolina Supreme Court acknowledged this Court's determination that trial court proceedings in criminal cases may not be summarily closed when the trial court is presented with a First Amendment claim to a right of access. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). However, the North Carolina Supreme Court found that the substantive issue of whether the trial court's findings were sufficient to support closure of the proceedings under the First Amendment "is different from the question of who should be allowed to appear and present the issue in a civil case and how it should be presented." (Pet. App. at 11a.)

Consequently, to decide the issue of who should be allowed to appear and present issues in a state civil action, the North Carolina Supreme Court turned to North Carolina law. Under North Carolina law, motions to intervene are governed by statute. Specifically, North Carolina General Statutes § 1A-1, Rule 24 determines when a third party may intervene as of right or permissively. Applying the requirements of the statute, the North Carolina Supreme Court concluded that Petitioners were not entitled to intervene as of right under Rule 24(a), as they had no direct and immediate interest in Dr. Virmani's wrongful termination action and the denial of the motion to intervene would not result in a practical impairment of the protection of the Petitioners' indirect interest in the case. (Pet. App. at 9a-10a.)

The North Carolina Supreme Court further concluded that the trial court properly exercised its discretion in denying Petitioners permissive intervention under Rule 24(b). Under North Carolina law, permissive intervention rests within the sound discretion of the trial court. The North Carolina Supreme Court found that "there was every reason for the trial court to believe that permitting the [Petitioners] to intervene would — as it has — unduly delay the adjudication of the rights of the original parties," and held that the trial court had not abused its discretion in denying Petitioners permissive intervention. (Pet. App. at 10a-11a.)

In addressing the issue of Petitioners' motion to intervene, the North Carolina Supreme Court properly rejected Petitioners' attempts to interweave a state procedural law question and a federal constitutional law question into a single legal issue. It correctly determined that the motion to intervene was a separate state law issue that did not involve federal law. The North Carolina Supreme Court's opinion clearly reflects that it relied exclusively on Section 1A-1, Rule 24 and applicable North Carolina case law to resolve the issue of Petitioners' motion to intervene, and therefore it is based on an adequate and independent state law ground.

B. The North Carolina State Procedural Law on Intervention Adequately Protects Petitioners' Due Process Rights and Is Not Governed by the First Amendment

As a general rule, this Court has deemed state procedural grounds to be an independent and adequate basis for a decision and sufficient to preclude the assumption of its jurisdiction. *See, e.g., Michigan v. Tyler*, 436 U.S. 499 (1973); *Henry v. Mississippi*, 379 U.S. 443 (1965). The Court

has recognized an exception to this rule, however, when the state procedural requirements deny a party due process of law. *See, e.g., Reece v. Georgia*, 350 U.S. 85 (1955). Petitioners have attempted to take advantage of this exception by contending that the North Carolina Supreme Court's ruling with respect to Section 1A-1, Rule 24 "is an offense to the First Amendment" because it effectively deprived them of procedural due process rights under the First Amendment. (Pet. at 16.) Petitioners claim that the *only* adequate and timely means of challenging the closure of proceedings is through intervention at the trial court level. (Pet. at 13-16.)

The North Carolina Supreme Court specifically addressed this due process argument in its opinion and determined that there were several means other than intervention by which Petitioners could have obtained a full and timely review of the issue of whether the court proceedings and records should be made public, including by: (1) extraordinary writ practice; (2) declaratory judgment action; or (3) use of established remedies in equity. (Pet. App. at 12a.) The court properly concluded that the Petitioners' due process rights were adequately protected because they could obtain a meaningful and timely review of their interests by these other means, which have been successfully used by the media and resulted in at least four decisions by this Court on this precise issue — the media's right of access to court proceedings and records. (Pet. App. at 12a) (citing *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (declaratory judgment action); *Press-Enterprise Co. v. Superior Court II*, 478 U.S. 1 (1986) (*Press-Enterprise II)* (mandamus proceedings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I)* (petition for writ of mandate); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (petitions for writ of

mandamus and prohibition)). Ironically, Petitioners repeatedly cite these decisions to support other aspects of their argument but fail to acknowledge that these decisions make it clear that there are various other methods by which questions as to the First Amendment right of access are frequently and successfully presented. These methods provide meaningful and timely opportunities for the public to be heard and serve to protect their procedural due process rights.

Nonetheless, Petitioners assert that to satisfy the procedural due process requirements of the First Amendment, this Court must grant review of this case and require state courts to allow the press and public to intervene as of right in state court actions to challenge the closure of proceedings. (Pet. at 13-16.) As reflected in the preceding paragraph, the First Amendment does not mandate that state courts allow the media to intervene in a state court action to present a right of access claim. Petitioners would, however, have this Court review the North Carolina Supreme Court's decision to determine whether the First Amendment guarantees the press a mandatory right to intervene in state court proceedings. This sweeping interpretation of the First Amendment has no merit and is a clear infringement on the power of the state courts to address state law procedural issues.

In appealing to this Court for a mandatory right of intervention, Petitioners use broad strokes to describe the North Carolina Supreme Court's ruling on the motion to intervene. They contend that the court's ruling bars the press from intervening and being heard by a trial court in all instances. (Pet. at 4, 16.) In fact, the North Carolina Supreme Court's ruling on the motion to intervene is narrowly drawn.

The court concluded that, under the particular circumstances of this case, the media was not entitled to intervene as of right and that the trial court did not abuse its discretion in denying Petitioners' motion for permissive intervention. (Pet. App. at 10a-11a.) The North Carolina Supreme Court did not state or imply that the media no longer has the right to intervene to challenge the closure of court proceedings or sealing of records. Under Rule 24, the trial court continues to have discretion in deciding motions to intervene.

In sum, although Petitioners repeatedly attempt to meld together the state procedural law issue of their motion to intervene with the substantive constitutional law issue of their motion to open state court proceedings, the North Carolina Supreme Court correctly held that Petitioners' right to intervene is governed exclusively by North Carolina law. Further, because the state procedural requirements of Section 1A-1, Rule 24 did not deny Petitioners due process of law, the court's ruling constitutes an adequate and independent state law ground for the North Carolina Supreme Court's decision.

Having ruled that the trial court properly denied Petitioners' motion to intervene, the North Carolina Supreme Court observed that "it would be appropriate for us to simply reverse the decision of the Court of Appeals without reaching the other issues raised by the Petitioners" because the ruling is dispositive of the case. (Pet. App. at 13a.) However, the court determined it should also address the substantive issue of whether Petitioners had an unqualified right of access to the court proceedings and records in this case. Although there appears to be no controlling law on this issue, it is reasonable for this Court to conclude that because the North Carolina Supreme Court resolved the question of intervention on an

independent and adequate state law ground and because this ruling is sufficient to dispose of the entire case, this Court has no jurisdiction to review the decision. It is clear that the court's ruling on the state procedural law issue must stand; thus, any ruling by this Court on the substantive issue presented by Petitioners would be purely advisory. Therefore, this Court should decline to review the decision.

II.

THE SUPREME COURT OF NORTH CAROLINA'S RULING ON PETITIONERS' RIGHT OF ACCESS IS NARROWLY DRAWN, CONSISTENT WITH FEDERAL LAW AND DOES NOT CALL FOR REVIEW BY THIS COURT

As noted above, the North Carolina Supreme Court also addressed Petitioners' substantive argument that the media and public have an unqualified right of access to the court proceedings and records at issue in this case. The court's ruling on this issue is consistent with the federal courts' rulings on the First Amendment right of access to the courts and does not raise any important federal law questions for this Court to review. Further, contrary to Petitioners' assertions as to the sweeping and drastic nature of the North Carolina Supreme Court's decision, the court carefully addressed each argument and narrowly tailored its rulings to the facts of this case.

Rule 10 of this Court states that petitions for certiorari will only be granted for "compelling reasons." Sup. Ct. R. 10. Although the Rule does not define what constitutes a "compelling reason," it provides examples of "compelling reasons" which will justify review. *See id.* These examples

illustrate that this Court exercises its discretion to review cases that decide important federal questions in conflict with other federal case law rather than cases in which the asserted error is a misapplication of a properly stated rule or erroneous factual findings. As the decision of the Supreme Court of North Carolina raises no important federal questions and is consistent with federal law, the Petitioners have failed to present any compelling reasons for this Court to review the decision.

A. The North Carolina Supreme Court's Ruling on the State Constitutional Right of Access Guarantees Petitioners Rights that Are at Least Equivalent to Their First Amendment Rights

In the present case, the North Carolina Supreme Court was asked to decide whether the North Carolina Constitution gives the public an absolute right of access to civil court proceedings and records. The issue was one of first impression for the court, and it is the only entity that can answer with finality questions concerning the proper construction and application of the North Carolina Constitution. As shown below, the North Carolina Supreme Court interpreted Article I, Section 18 of the North Carolina Constitution in a manner that is consistent with the First Amendment right of access decisions rendered by the federal circuit courts.

Article I, Section 18, provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. There is no parallel open courts provision in the United States Constitution. Thus,

the North Carolina Supreme Court observed, " 'we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.' " (Pet. App. at 31a) (citation omitted). However, recognizing that this Court has held that a qualified right of public access to *criminal* trials is implicit in the First Amendment, *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07 (1982), the North Carolina Supreme Court interpreted the "open courts" provision of the North Carolina Constitution in a manner that is virtually identical to the First Amendment right of access decisions of this Court and the federal appellate courts.

The federal law on the First Amendment right of access provides the framework for the North Carolina Supreme Court's interpretation of the "open courts" provision. The federal appellate courts which have addressed the issue have held that the First Amendment creates a presumptive right of public access to civil proceedings and records. *See, e.g., Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984). In construing the First Amendment right of access in criminal cases and related proceedings, this Court has determined that when the state meets its burden of showing a compelling government interest, the trial court may, in the interest of fair administration of justice, impose reasonable limitations on access to a trial. *See Richmond Newspapers*, 448 U.S. at 582. However, before a trial court may deny access to a criminal trial, the trial court must determine that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest. *See Globe Newspapers*, 457 U.S. at 606-07. This Court also has required the presiding judge to consider

reasonable alternatives before closing criminal proceedings and to make specific findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether closure was proper. *See Press-Enterprise II*, 478 U.S. at 9-10; *Press-Enterprise I*, 464 U.S. at 824.

In its opinion, the North Carolina Supreme Court adopted a strikingly similar, if not identical, approach in construing the right of public access to court proceedings under the North Carolina Constitution. Like the federal circuit courts, the North Carolina Supreme Court interpreted Article I, Section 18 to create a presumptive right of access on the part of the public to attend civil court proceedings and records. Consistent with this Court's approach, it explained, however, that such a right is "subject to reasonable limitations imposed in the interest of the fair administration of justice and for other compelling public purposes." (Pet. App. at 33a.) The North Carolina Supreme Court also adopted this Court's procedural requirements for limiting access and instructed that the trial court must consider alternatives to closure and must "make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access." (Pet. App. at 33a-34a.)

Clearly, the North Carolina Supreme Court interpreted the open courts provision of the North Carolina Constitution in a manner that is fully consistent with the First Amendment right of access as defined by the federal courts and expressly recognized that a presumptive right of access to civil court proceedings and records exists under North Carolina law.

In analyzing Petitioners' state constitutional right of access, the North Carolina Supreme Court noted that the North Carolina legislature has recognized the public's compelling interest in the confidentiality of peer review records by enacting North Carolina's peer review statute, Section 131E-95, and "making the confidentiality of medical peer review investigations part of our state's public policy." (Pet. App. at 34a.) Refusing to rely solely upon the legislature's public policy judgment, however, the North Carolina Supreme Court reviewed the sealed records in this case and determined for itself that in this case the compelling public interest in promoting the public health by encouraging candor and objectivity in the internal workings of medical peer review committees outweighs the public's interest in access to civil court proceedings and records. Therefore, in its view, the trial court properly closed the court proceedings to the public and properly sealed the confidential peer review records tendered to it. (Pet. App. at 36a.)

Apparently hard-pressed to criticize the North Carolina Supreme Court's analysis, Petitioners have resorted to attacking the public policy underlying North Carolina's Section 131E-95. Petitioners characterize the law as nothing more than a "sweetheart deal" between the North Carolina legislature and the state's medical profession and contend that a failure by this Court to take issue with the statute could lead to a proliferation of similar arrangements for the benefit of various industries. (Pet. at 22.)[1] Indeed, Petitioners even suggest that, through its opinion in this case, the North

1. Petitioners' argument betrays their fundamental assumption that this Court sits to supervise and second guess the North Carolina General Assembly's exercise of a uniquely legislative function — balancing important but competing public interests. Their argument should therefore be rejected on principles of federalism alone.

Carolina Supreme Court has placed itself in an "unseemly partnership" with the special interests of the medical profession. (Pet. at 26.) Such allegations ignore the basic fact that the health and well being of the people of North Carolina are — and should be — a vital concern of the North Carolina legislature and constitute a concern that can properly be accorded great weight by the State's highest court. Indeed, the citizens of North Carolina and their elected representatives have an enormous interest in the competence of their doctors. Effective procedures to remove those medical practitioners who endanger the lives or well-being of their patients is obviously critical to this interest. As the North Carolina Supreme Court aptly stated: "[t]he public's interest in access to these court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members." (Pet. App. at 35a.) The court concluded that

> [b]ecause such open and honest communication in medical peer review proceedings help to assure high quality public medical care, maintaining and protecting this confidentiality is in the public's best interest [and] the compelling countervailing public interest in such high quality medical care overcomes the qualified public right to open civil court proceedings and records of those proceedings.

(Pet. App. at 35a.)

In sum, the North Carolina Supreme Court's interpretation of the North Carolina Constitution affords Petitioners a right of access to civil court proceedings and records that is substantially equivalent to the right of access which federal courts have guaranteed under the First Amendment. For powerful and compelling reasons, however, the court ruled that Petitioners' right of access should be limited in this case because of countervailing public interest in high quality medical care. The court's rulings on the constitutional issues do not diminish the rights Petitioners would have under federal law, and it is therefore improper for this Court to review the North Carolina Supreme Court's decision on a uniquely state law question.

B. The North Carolina Supreme Court Properly Applied Federal Law to Determine the Petitioners' First Amendment Right of Access to the Court Proceedings and Records in this Case

Having concluded that Petitioners' North Carolina Constitutional right of access can properly be restricted in this case, the North Carolina Supreme Court also addressed the federal issue of whether Petitioners' First Amendment right of access can be restricted. In doing so, the North Carolina Supreme Court observed that this Court has never expressly decided whether the public has a First Amendment right of access to *civil* proceedings or civil court records, although the Court has noted that civil trials historically have been presumptively open to the public. (Pet. App. at 36a-37a.) With no direct precedent to guide it, the North Carolina Supreme Court considered the issue as any federal appellate court would — by considering relevant cases from this Court and looking to other federal appellate courts for guidance.

Although the North Carolina Supreme Court noted that the federal circuit courts had found a First Amendment presumptive right of access to civil proceedings and records, it observed that this Court has found that First Amendment rights of access are qualified and can, under appropriate circumstances, be restricted. The court also applied this Court's experience/logic test from *Press-Enterprise II* and questioned whether the First Amendment right of access would apply at all in this case. (Pet. App. at 37a.) Nonetheless, the North Carolina Supreme Court relied on its review of federal case law to assume, *arguendo*, that this Court would hold that a qualified First Amendment right of access attaches to civil cases. (Pet. App. at 36a.)

In analyzing the Petitioners' First Amendment right of access in this case, the North Carolina Supreme Court applied the rules established for criminal cases by this Court for restricting the First Amendment right of access. Relying on its previous analysis of the government interest in protecting the confidentiality of peer review information, it concluded that "the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and that no alternative to closure will adequately protect that interest." (Pet. App. at 36a.)

Thus, in ruling on Petitioners' First Amendment right of access to civil court proceedings and records in this case, the North Carolina Supreme Court reasonably assumed that there was a qualified First Amendment right of access and limited that right of access by applying rules that have been laid down by this Court in its First Amendment case law. This reasonable approach to resolving this federal issue clearly does not conflict with federal law and does not

provide a compelling reason for this Court to review the North Carolina Supreme Court's decision on the federal issue in this case.

As discussed above, Petitioners have complained that the government's interest in protecting the confidentiality of peer review information does not justify denying access to the proceedings and records at issue in this case. However, there is simply no basis for Petitioners' contention that this conclusion creates a fundamental federal constitutional question "of the highest order" which the Supreme Court must resolve. Having applied federal First Amendment law consistently with the decisions of this Court and the lower federal courts, the only issue that could possibly remain for this Court to review is the Petitioners' chief complaint that this law was applied in a manner that did not suit Petitioners. Such a claim does not present a federal question worthy of this Court's review.

C. The North Carolina Supreme Court's Rulings Denying Petitioners Access to the Records and Proceedings at Issue in this Case Did Not Prevent It From Allowing Access Under Appropriate Circumstances

Petitioners argue that the North Carolina Supreme Court's decision mandates closure of all proceedings and sealing of all peer review records on the basis of a state statute. In reality, the decision is simply not as sweeping as Petitioners suggest. The North Carolina Supreme Court reviewed North Carolina law on the confidentiality of medical peer review records and proceedings and found a clear legislative intent in Section 131E-95 to protect the confidentiality of peer review records. Nevertheless, the court held that even when records qualify as confidential peer

review documents, there are circumstances under which the press and public are entitled to access to these records. In this instance, the North Carolina Supreme Court concluded that Section 131E-95 did not protect the confidentiality of the peer review records attached to Dr. Virmani's complaint and filed with the clerk because they had become "public records" under North Carolina law. Accordingly, the court held that the media and public were entitled to access to the records and ordered that they be unsealed. (Pet. App. at 18a-19a.) Petitioners, however, studiously avoid any acknowledgment that the North Carolina Supreme Court ruled that the press and public had a right of access to those peer review records which had been filed with the clerk of court.

In their final argument, Petitioners focus on the right of access to court *records* and claim that the North Carolina Supreme Court's decision directly conflicts with federal law because it fails to acknowledge a First Amendment presumptive right of access to "judicial records." (Pet. at 29.) A review of the court's opinion quickly establishes that this argument is without merit. Not only did the North Carolina Supreme Court assume that the First Amendment guarantees a qualified right of access to the records at issue in this case, the North Carolina Supreme Court expressly decided that the North Carolina Constitution guarantees a qualified right of access to civil court records. (Pet. App. at 34a, 41a.) As there is no conflict between the North Carolina Supreme Court's decision and federal First Amendment law, the decision provides no basis for review.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 99-1011

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KNIGHT PUBLISHING COMPANY, d/b/a *THE CHARLOTTE OBSERVER*, and JOHN HECHINGER
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Respondent.

On Petition for Writ of Certiorari to the to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF THE PETITIONERS

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Under Supreme Court Rule 37.2(b), the Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors move the Court to allow them to file their *amici curiae* brief in support of the petitioners, which follows this motion.

Petitioner Knight Publishing Company has consented to the filing of the attached brief. Respondent Presbyterian Health Services Corporation has withheld its consent to the filing of the attached brief.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

Amici curiae are journalists who report on matters of public concern. This case concerns an issue critical to the media specifically and the public in general: whether legislation can cut off public access to broad categories of civil litigation. Indeed, the media has been involved in this case since the trial level, where a reporter unsuccessfully objected to a motion for closure and requested a continuance to contact his attorney. In response to his efforts, he was ejected from the courtroom. The reporter's newspaper then unsuccessfully sought to intervene in the case for the limited purpose of opposing closure. The trial court rejected its efforts without holding a hearing.

In establishing the public's presumptive constitutional right of access to attend criminal trials, this Court has discussed the public policy reasons supporting access. Those reasons include but are not limited to the following: that openness ensures the accountability of our civil justice system, improves the functioning of a trial, provides an outlet for public concern, improves the public's understanding and acceptance of the judicial system, improves informed public debate, fosters an appearance of fairness, and permits the public to serve as a check on the judicial process.

These public policy factors also favor a presumptive right of access to civil trials. For better or worse, many of the most critical public policy battles are now fought through civil litigation. The front pages of America's newspapers are filled with stories about antitrust litigation against software companies, product liability litigation against cigarette companies and automobile manufacturers, toxic tort litigation against chemical manufacturers, class action lawsuits concerning breast implants, and wrongful death lawsuits against people acquitted of criminal murder charges. This phenomenon is hardly new. As this Court noted in discussing the history of civil rights litigation, "[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

If the North Carolina decision is allowed to stand, members of the public could be excluded from any broad category of cases that the legislature deemed improper for public purview. For example, a legislature could pass a statute mandating a closed courtroom for all lawsuits brought by the attorney general or against the state. Under the North Carolina Supreme Court's reasoning, such a statute would preempt the

First Amendment right of access for the public to all trials falling within those categories.

Given the broad ramifications of a decision in this area for First Amendment interests, *amici curiae* respectfully request that this Court grant it leave to file the attached brief.

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors

[1] Under Supreme Court Rule 37.6, counsel for *amici curiae* state that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief. A motion for leave to file this brief was filed under Supreme Court Rule 37.2(b).

that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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SUMMARY OF ARGUMENT

The media's interests in the outcome of this case can hardly be overstated. At trial, a judge overruled a reporter's objection to a motion for closure on the hearing of pending summary judgment motions, denied a request for a continuance for the reporter to contact his attorney, and then ejected the reporter and closed the courtroom. On the following day, the trial court denied a motion for intervention without allowing a hearing. Despite the absence of any of the procedural steps necessary to close a courtroom, the North Carolina Supreme Court affirmed the trial court's rulings, finding that the presumption of openness in civil proceedings under the state and federal constitutions did not create a right for the public to argue against the closure of a courtroom, and that the state statute concerning medical review committee

materials mandated closure of the proceedings and sealing of the records without the necessity of a hearing.

In *Richmond Newspapers, Inc. v. Virginia* and its progeny, this Court looked in part to public policy arguments when it established the First Amendment right-of-access framework for criminal trials. In the 20 years since the Court issued *Richmond Newspapers*, a plethora of federal and state appellate courts have looked to those same public policy arguments in finding that the right of access also applies to civil litigation. Indeed, even the North Carolina Supreme Court's decision here acknowledged that the First Amendment right of access would apply to this civil case.

This Court's decisions make clear that a presumption of access applies to criminal cases, and that a trial court can overcome that presumption only by allowing the public an opportunity to be heard before closure and then issuing specific findings of fact showing that a compelling government interest justifies denying access and that the denial of access is narrowly tailored to achieve that goal. The presumption of openness and procedural safeguards have been extended to civil cases as well.

But in this case, the North Carolina trial court did not acknowledge the public's right of access to attend the civil trial. It gave the media entity seeking access no opportunity to be heard on the issue of closure of the courtroom. It issued no findings of fact that attempted to justify its closure of the court and its decision to disregard the constitutional right of access. And it did not explain how its remedy—complete closure of the courtroom—constituted a narrowly tailored solution to the situation.

The North Carolina Supreme Court noted the aforementioned facts but held that the state statute concerning peer review records trumps the constitutional right of access. According to the court, the statute's applicability in a lawsuit eliminates any need to give the public a right to be heard and for the trial court to issue findings of fact explaining why a First Amendment right of access has been overcome in this particular case. The North Carolina Supreme Court has allowed a trial court to subordinate a First Amendment right to a state confidentiality statute without holding a hearing and making any findings that attempt to justify the decision.

The North Carolina Supreme Court is attempting to allow the closing of broad categories of civil litigation from the public, and by doing so it has abridged the public's First Amendment rights.

ARGUMENT

I. This Court has recognized the public's First Amendment right of access for criminal cases.

A. This Court used historical and public policy factors to support a right of access.

In a series of cases beginning in 1980, this Court held that the public has a First Amendment right of access to attend criminal trials and related criminal proceedings.[2] In reaching its conclusion, the Court first "considered whether the place

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[2] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993).

and process have historically been open to the press and the general public." *Press-Enterprise II*, 478 U.S. at 8 (citing *Globe Newspaper*, 457 U.S. at 605 and *Richmond Newspapers*, 448 U.S. at 589). Second, it "considered whether public access plays a significant positive role of the functioning of the particular process in question." *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

B. This Court has established procedural safeguards to protect the right of access.

In *Richmond Newspapers* and its progeny, this Court has established procedural requirements that must be carried out before closing a courtroom. *See generally* C. Thomas Dienes et al., *Newsgathering and the Law* § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the litany of U.S. Supreme Court right of access decisions).

"[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)). For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a courtroom. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

If a trial court wants to close its courtroom following the hearing, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional

right of access] and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13-14. One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

II. The constitutional right of access has been applied to civil litigation.

A. The factors that led to a right of access to criminal trials are identical for civil trials.

This Court has not ruled on whether the right of access applies to civil cases as well. Nevertheless, its opinions have discussed the similar historical background of both criminal and civil litigation and the similar public policy factors at issue in both criminal and civil litigation.

In 1979 in *Gannett Co. v. DePasquale*, this Court noted the striking similarities between the history of the public's right to attend civil and criminal trials:

> [H]istorical analysis . . . is equally applicable to civil and criminal cases . . . . For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil *as well as* criminal matters" (emphasis added). *Remarks upon Mr. Cornish's Trial*, 11 How. St. Tr. 455, 460. English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two. *E. g.*, 2 E. Coke, *Institutes of the Laws of England* 103 (6th ed. 1681) ("all Causes ought to be heard . . . openly in the Kings Courts"); 3 W. Blackstone, *Commentaries*;

M. Hale, *The History of the Common Law of England* 343, 345 (6th ed. 1820); E. Jenks, *The Book of English Law* 73-74 (6th ed. 1967).

The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil *or* criminal," *Concessions and Agreements of West New Jersey* (1677), ch. XXIII, *quoted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129 (1971) (emphasis added). Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that "all courts shall be open, 1 *Schwartz*, *supra*, at 140, 271 (emphasis added).

. . . In short, there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.

Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. *E. g., Dred Scott v. Sandford*, 19 How. 393; *Plessy v. Ferguson*, 163 U.S. 537; *Brown v. Board of Education*, 347 U.S. 483; *University of California Regents v. Bakke*, 438 U.S. 265. Thus, in some civil cases the public interest

> in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

Gannett, 443 U.S. at 386-87 n.15.

Since the issuance of *Richmond Newspapers* one year after *Gannett*, many members of this Court have noted that both the historical and functional component of the right-of-access framework lead to the conclusion that civil and criminal trials should be treated alike. *Richmond Newspapers*, 448 U.S. at 580 n.17 (stating that "whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open"); *Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring) ("The First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."); *Press-Enterprise II*, 478 U.S. at 27 (Stevens, J., dissenting) ("[T]he logic of the Court's access right extends beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket.").

B. Lower courts have held that a constitutional right of access applies to civil trials.

Perhaps because of the discussion of civil trials in *Gannett* and *Richmond Newspapers*, federal and state appellate courts have concluded that the access rights established by this Court in the criminal context also apply in the civil context.[3] Even

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[3] *See, e.g., Simmons v. Conger*, 86 F.3d 1080 (11th Cir. 1996); *United States v. A.D.*, 28 F.3d 1353, 1356 (3d Cir. 1994); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), (continued...)

the North Carolina Supreme Court in this case acknowledged that "[a]lthough the Supreme Court has never decided the question of whether the public has a First Amendment right to attend civil court proceedings or to view civil court records, the Court has noted that civil trials historically have been presumptively open to the public." *Virmani v. Presbyterian Health Services Corp.*, 515 S.E.2d 675, 695 (N.C. 1999) (citing *Richmond Newspapers*, 448 U.S. at 580 n.17, and *Gannett*, 443 U.S. at 386 n.15).

A reading of the federal and state opinions that conclude that the public enjoys a right of access to civil trials shows that the procedural safeguards found to be essential in the criminal context also apply to civil proceedings. For example, the U.S. Court of Appeals for the Eleventh Circuit described the type of procedural safeguards that it believed must be put in place before closing a civil trial:

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[3](...continued)
cert. denied, 472 U.S. 1017 (1985); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650 (S.D. Tex. 1996); *NBC Subsidiary, Inc. v. Superior Court*, 9870 P.2d 337 (Cal. 1999); *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996); *Hutchinson v. Luddy*, 581 A.2d 578, 581 (Pa. Super. 1990); *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988); *see generally NBC Subsidiary*, 980 P.2d at 358-59 ("No case to which we have been cited or of which we are aware suggests, much less holds, that the First Amendment right of access as articulated by the high court does not apply, as a general matter, to ordinary civil proceedings."); C. Thomas Dienes et al., *Newsgathering and the Law* § 3-2(a) (2d ed. 1999) (describing the holdings of federal and state courts that extended this Court's holdings about access to criminal trials to civil trials).

> There is nothing in this record that supports the closing of these proceedings to the press and public. The district court did not hold any hearing after proper notice, nor did it enter findings that justify any restrictions on public access to the proceedings. *See Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2622, n.25 (the press must be afforded an opportunity to present its case for an open proceeding); *Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring) (same). See also Note, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 Temp. L.Q. 311, 332 (1979). We commend to the trial courts the same procedure that has been recommended in a fair trial-free press context. See ABA, *Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press* (1976).
>
> Other procedures also might accomplish the purpose. . . . We do not bind the district courts to the formality of any set procedure. But the issue must be squarely confronted and those with various interests must be given the opportunity to be heard.

Graddick, 696 F.2d at 802; *see also Publicker Indus.*, 733 F.2d at 1070 (holding that before a court closes a civil courtroom it must show that a denial serves an important government interest, that no less restrictive way exists to serve that government interest, and that the court has made record findings in order to facilitate meaningful governmental review).

C. The North Carolina decision ignores the constitutional right of access to the civil courts.

Amici have previously explained that the newspaper reporter and his employer in this case took every possible step to have the court consider the public's interest in keeping the courtroom open: they complained about the efforts to close the courtroom, requested that the court delay the trial so that they could file a motion for limited intervention, and requested a hearing on their intervention motion. But the North Carolina Supreme Court opinion states that the presumption of openness in civil proceedings did not create a right for the public to argue against the closure of a courtroom, and that the state statute concerning medical review committee materials mandated closure of the proceedings and sealing of the records regardless of whether the trial court held a hearing.

The state high court's holdings ignore the nationwide public policy concerns that affect all members of the public. Closing a category of cases—such as medical licensing cases that involve medical review materials—leads to increased public concern for what takes place behind closed doors, fosters public doubts about the private justice that certain people and entities get in the public courts, harms public debate about the issues involved in the litigation, and perhaps most devastatingly fosters an appearance of unfairness, that certain members of society can shut off access to the public courts.

It is inconceivable that this Court would allow a legislature to shut off access to a category of criminal cases, in large part because of the devastating impact that such a statute would have on public confidence in the fairness and accountability of the criminal justice system. It should not

allow legislation that cuts off access to the civil justice system for the identical public policy reasons.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

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No. 99-1011

IN THE

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY, d/b/a
THE CHARLOTTE OBSERVER,
and JOHN HECHINGER

Petitioners,

v.

PRESBYTERIAN HEALTH SERVICES CORP.

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONERS

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In its Brief in Opposition, Respondent asserts that this Court lacks jurisdiction over this matter because the North Carolina Supreme Court decision below rests on independent and adequate state grounds.[1] However, in advancing this theory, Respondent gravely misconstrues the North Carolina Supreme Court's decision and mischaracterizes the essential core of the Petition before this Court.

In support of its argument, Respondent asserts that the North Carolina Supreme Court's opinion is founded solely upon resolution of an issue of state procedural law (the right of Petitioners to intervene and be heard on the issue of court closure) which it contends is entirely independent of a secondary federal question (the public's rights under the Due Process Clause and the First Amendment to attend civil court proceedings). This argument is without merit and wholly ignores the fact that the North Carolina Supreme Court's decision, even if superficially based upon a state procedural law, necessarily and unavoidably violates the substantive protections and requirements dictated by the Due Process Clause and First Amendment of the United States Constitution. Taken to its logical conclusion, Respondent's contentions would mean that state courts have the discretion to trump federal constitutional mandates by simply bypassing federal constitutional principles in favor of contrary state laws.

Respondent's argument also mischaracterizes and misconstrues the basic core of the Petition. The very heart of Petitioners' position is that the state procedure found by the North Carolina Supreme Court to prevent the public from being heard on the issue of closing a court proceeding violates the First Amendment and the Due Process Clause of the United States Constitution on multiple grounds. The Petition

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[1] Petitioners stand by all substantive arguments in their Petition for Certiorari and limit this Reply to Respondent's meritless jurisdictional argument.

maintains that the United States Constitution imposes a *federal* requirement that state trial courts, upon a motion to close civil court proceedings: (1) conduct a closure hearing at a timely juncture; (2) weigh, in a case-specific analysis, the factors that the Supreme Court has instructed must be considered before a closure can be mandated; and (3) make explicit findings on the record of its analysis and assessment of the facts, just as this court has held they must do in criminal cases. The North Carolina trial court did not do this and the Supreme Court of North Carolina has approved this conduct on the basis of state procedural grounds. Moreover, while it is true that the North Carolina Supreme Court's holding that the public has no right to be heard by a trial court in objection to the closure of judicial proceedings is based upon North Carolina procedural rules, one of the primary points of the Petition is that under the United States Constitution there *must* be such a right.

Concisely put, it is the Petitioners' position that the United States Constitution requires state courts to follow these procedures, and the fact that North Carolina did not do so creates a federal question, plain, pure and simple. Where a state judgment is based upon a state procedure that defeats federal constitutional rights, it cannot be said that such a state judgment rests on independent and adequate state grounds. The proposition central to the Petition for Writ of Certiorari is that *federal* principles arising under the United States Constitution circumscribe the procedures a state court tribunal may implement when a motion to close court proceedings or records is before it.

The Petitioners' position on these matters of federal constitutional law may be correct or they may be incorrect, it is for this court to say; however, these are entirely federal questions, not state ones. This is the core and basis upon which the Petition rests.

Consequently, the North Carolina Supreme Court decision is not and *cannot* be based upon independent state grounds and this Court has jurisdiction over this cause which it should exercise and grant the Petition.

Respectfully submitted,

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